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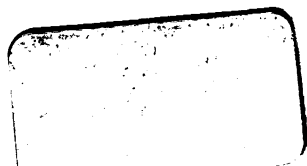
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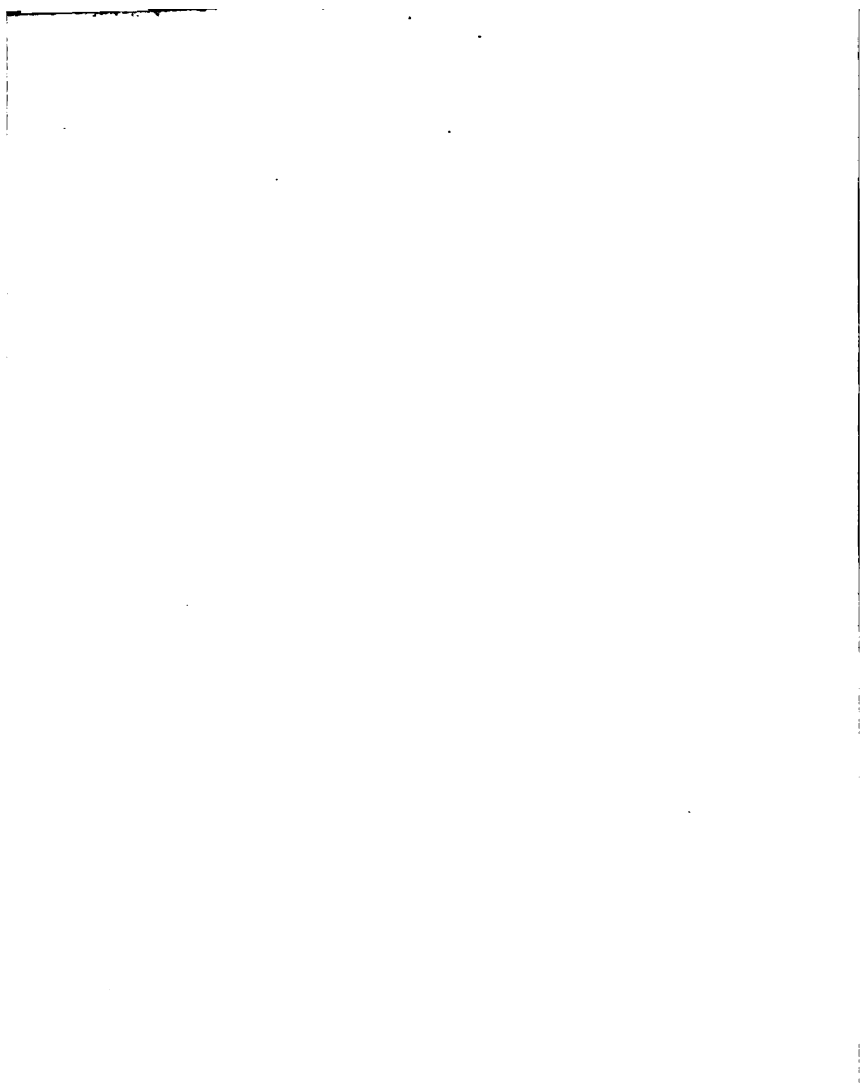




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**ELEMENTS**  
**OF THE**  
**LAW OF CONTRACTS.**

**BY**  
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STANFORD UNIVERSITY

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VSAR 1898

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TO

MELVILLE M. BIGELOW, PH.D.,

WHOSE FRIENDSHIP HAS BEEN ITS CAUSE, AND WHOSE  
EXAMPLE HAS BEEN ITS INSPIRATION,

THIS BOOK IS DEDICATED WITH GRATEFUL AFFECTION  
BY HIS FRIEND AND PUPIL

THE AUTHOR.



## PREFACE.

---

THE science of English law has been the victim of two opposing forces, each tending to retard its development. On the one hand, the practical lawyer of average intelligence has for centuries sought for nothing but precedents without regard to the principles which the precedents represent. On the other hand, the scholar at Oxford or Cambridge has for as many centuries been influenced by the idea that the science of law is essentially Roman in its character. The lawyer has not endeavored to construct a science of English law because it has not seemed to him worth while; and the attempts of the scholar have been largely confined to recasting English ideas and institutions in a Roman mould. The recent development of the historical spirit in the study of the law is changing all this. "If English-speaking lawyers," says Sir Frederick Pollock, "are really to believe in their own science, they must seek a genuine philosophy of the common law, and not be put off with a surface-dressing of Romanized generalities."<sup>1</sup> In

<sup>1</sup> Address before the Harvard Law School, IV. Harvard Graduates' Magazine, 8.

short, we are just awakening to the fact that there is a science of English law, and that the principles of this science are to be discovered by the careful study of our own legal history, and not by the analysis of the theories of Continental jurists.

The justification of this book is, as the justification of every book which purports to be anything more than a mere compilation must be, that it is an attempt to explain the rules of positive contract law which are to-day enforced by the courts of England and the United States, in accordance with the actual historical development of those rules, and to classify and arrange those rules as far as possible in a scientific manner. If this attempt has been in any degree successful, the author's labor has not been lost.

The difficulties in the preparation of a treatise on Contracts are by no means small. The absence of any theory of contracts in our early law, the slow development of the different legal ideas which govern contracts at the present day, the conflict between law and equity, and the various artificial theories advanced to account for perfectly natural legal rules, have brought about confusion that at times seems almost hopeless. If the task of an English writer on Contracts is no easy one, what shall be said of the position of his fellow-laborer in America? In England there is at least positive law; in this country our positive law is purely local; and though we all claim the same heritage of the common law,

we treat our inheritance very differently, and sometimes very indifferently, in different jurisdictions. The decisions of the House of Lords and of the United States Supreme Court alike are swept aside by some State court with this cogent argument: "We cannot accept this doctrine." The constant progress and development of the law, especially with reference to commerce and industry, call for strenuous exertions on the part of the jurist who would keep abreast of the times; but when the law progresses in so many different directions in different jurisdictions, one who loves harmony and consistency feels as if he were being drawn and quartered by the conflicting decisions. The writer can only record and interpret these decisions to the best of his ability, emphasizing on the one hand the great principles enunciated by master-minds, and pointing out on the other the extraordinary results which so frequently flow from judicial vagaries.

As regards legal theory, the most distinctive features of this book may be briefly stated. First comes the recognition of the fact that contractual obligation in English law may be due to the act of one party or of two; or to use my own terminology, may be unifactoral or bifactoral. Second, I have carefully separated the facts which are essential to the formation of contract from those which merely affect the validity of contracts when formed. Third, I have treated all voidable contracts under the one head of Rescission. In my treatment of Rescission

I have derived great assistance from Mr. Bigelow's treatment of that subject in his work on Fraud. Fourth, I have endeavored to reduce all rules of Offer and Acceptance to rules of Consideration, in accordance with the suggestion made by Mr. Justice Holmes in his work on the Common Law. Fifth, I have treated under the head of the Construction of Contracts certain subjects like Impossibility which are ordinarily treated elsewhere. Sixth, I have tried to shed some additional light on the difficult subject of Conditions. Seventh, I have sought to give an adequate account of the nature and results of the judicial legislation by which, in many States, a stranger to a contract is permitted to sue upon it—a doctrine which is one of the least intelligible and least understood of any in our law of Contracts.

My indebtedness to those who have preceded me in the same field has, I trust, been duly acknowledged in the proper place. I must here, however, make especial acknowledgment of the constant encouragement and advice which I have received from my friend Mr. Bigelow; and of many valuable suggestions with reference to the theory of contractual obligation which have been imparted to me from time to time by my colleague, Professor John H. Wigmore.

As this treatise is intended especially for the use of students, I have sought to make it as useful as possible by adding constant references to Langdell and Williston's Cases on Contracts, and to Huffcutt

and Woodruff's American Cases on Contract. That a study of cases is absolutely essential to a thorough understanding of the law is now universally recognized; and the references in the notes to the excellent collections just mentioned will enable the student who reads this book to refer readily to many of the leading authorities. References have also been added in some cases to certain other collections. The citations of American cases are not only of the official reports, but also of the National Reporter System.

E. A. H.

NORTHWESTERN UNIVERSITY LAW SCHOOL,  
*February, 1896.*





# CONTENTS.

	Page
ABBREVIATIONS . . . . .	xxi
CASES CITED . . . . .	xxiii

## INTRODUCTION.

PART I. The Nature of Contractual Obligation . . .	1
PART II. The History of Contractual Actions . . .	15

## CHAPTER I.

### THE FORMATION OF CONTRACT.

§ 1. INTRODUCTORY . . . . .	27
§ 2. NECESSITY OF AN ACT . . . . .	27
§ 3. THE ACT MUST BE VOLUNTARY . . . . .	29
§ 4. THE ACT MUST DETERMINE THE EXTENT OF THE OBLIGATION . . . . .	30
§ 5. THE LAW MUST IMPOSE OBLIGATION AS THE RE- SULT OF THE ACT. . . . .	32
(a) Contractual Capacity . . . . .	33
(b) Reasonableness of Promisee's Conduct . . .	34
(1) Jests and Social Engagements . . . .	34
(2) Inherent Impossibility . . . . .	34
(3) Execution of Written Instruments . . .	35
§ 6. FORMAL AND SIMPLE CONTRACTS . . . . .	38
(a) Formal Contracts . . . . .	38
(1) Contracts of Record . . . . .	39
(2) Specialties . . . . .	39
(a) Signing . . . . .	40
(b) Sealing . . . . .	40
(c) Delivery . . . . .	41
(d) Acceptance . . . . .	41

	Page
§ 6. FORMAL AND SIMPLE CONTRACTS — <i>continued</i> .	
(b) Simple Contracts . . . . .	43
(1) Necessarily Bifactoral . . . . .	43
(2) The Primary Act, or Promise . . . . .	43
(a) Acceptance of Benefits . . . . .	43
(b) Business Circulars and Proposals . . . . .	45
(c) Auctions . . . . .	46
(d) Time Tables . . . . .	47
(e) Acceptance of Documents . . . . .	47
(f) Written Contracts . . . . .	50
(g) Agreement for Future Contract . . . . .	52
(3) The Secondary Act, or Consideration . . . . .	53
(a) Origin of the Doctrine of Consideration . . . . .	53
(b) Definitions and Instances of Consideration . . . . .	56
(c) Mutual Promises . . . . .	58
(d) Distinction between Consideration and Condition Precedent . . . . .	59
(e) Adequacy of Consideration . . . . .	60
(f) Contingent Consideration . . . . .	61
(g) Performance of Legal Obligation . . . . .	64
(1) Effect of Uncertainty as to One's Rights . . . . .	66
(2) Performance of Broken Contract . . . . .	70
(3) Performance of Contract with Third Person . . . . .	74
(h) Composition with Creditors . . . . .	77
(i) Subscription Papers . . . . .	78
(j) Consideration must be furnished in Reliance on the Promise . . . . .	80
(1) Mutual Promises . . . . .	80
(2) Pre-existing Obligation . . . . .	81
(3) <i>Flight v. Reed</i> . . . . .	82
(4) Past Consideration . . . . .	82
(5) Moral Obligation . . . . .	84
(k) Offer and Acceptance . . . . .	85
(1) Relation of Offer and Acceptance to Consideration . . . . .	85
(2) Communication of Acceptance . . . . .	86

## CONTENTS.

xiii

### § 6. FORMAL AND SIMPLE CONTRACTS — *continued*.

Page

#### (b) Simple Contracts — *continued*.

(l) The Consideration is determined by the Promise . . . . .	89
(m) Revocation of Promise . . . . .	95
(n) Consideration in Deeds . . . . .	99
(o) Consideration in Negotiable Instru- ments . . . . .	99

## CHAPTER II.

### ILLEGAL CONTRACTS.

§ 1. INTRODUCTORY . . . . .	101
§ 2. CLASSES OF ILLEGAL CONTRACTS . . . . .	101
(a) Prohibited Contracts . . . . .	101
(b) Contracts to do a Prohibited Act . . . . .	102
(c) Contracts contemplating an Injury to the Legal Rights of a Third Party . . . . .	102
(d) Contracts against Public Policy . . . . .	106
(1) Contracts tending to injure the State in its External Relations . . . . .	106
(2) Contracts tending to Interfere with the Internal Administration of the Government . . . . .	106
(a) Contracts tending to Interfere with the Election or Ap- pointment of Public Officers . . . . .	106
(b) Contracts tending to prevent Public Officers from perform- ing their Duties . . . . .	107
(c) Contracts tending to Obstruct the Administration of Justice . . . . .	109
1. Maintenance and Cham- perty . . . . .	109
2. Contracts tending to stifle Prosecution . . . . .	112
3. Miscellaneous . . . . .	112
4. Contracts to Submit to Arbitration . . . . .	113

	Page
§ 2. CLASSES OF ILLEGAL CONTRACTS — <i>continued.</i>	
(b) Contracts against Public Policy — <i>continued.</i>	
(3) Contracts tending to Injure the Citizens of the State as Individuals . . . . .	114
(a) Contracts Injurious to Public Morals . . . . .	114
1. Sexual Immorality . . . . .	114
2. Contracts tending to Interfere with the Mar- riage Relation . . . . .	114
3. Wagering Contracts . . . . .	115
(b) Contracts tending to Limit Nec- essary Individual Freedom . . . . .	118
1. Contracts affecting Free- dom of Marriage . . . . .	119
2. Contracts affecting Free- dom of Testamentary Disposition . . . . .	119
3. Contracts in Restraint of Trade . . . . .	120
4. Contracts to Surrender Certain Rights . . . . .	123
§ 3. GENERAL RULES AS TO ILLEGALITY . . . . .	124
(a) Object Unlawful . . . . .	124
(b) Consideration Illegal . . . . .	124
(c) Contract Legal, Intention Innocently Illegal . . . . .	124
(d) Tendency Illegal . . . . .	124
(e) Intention of One Party Illegal . . . . .	125
(f) Vendee's Intention Illegal . . . . .	125
(g) Borrower's Intention Illegal . . . . .	126
(h) Illegal and Void Contracts . . . . .	126
(i) Securities for Illegal Contracts . . . . .	128
(j) Effect of Illegality . . . . .	128
(k) Receipt of Proceeds of Illegal Transaction . . . . .	131
(l) Partial Illegality . . . . .	132

## CONTENTS.

xv

### CHAPTER III.

JOINT AND SEVERAL CONTRACTS . . . . .	Page 137
---------------------------------------	-------------

### CHAPTER IV.

#### CONDITIONS.

§ 1. NATURE OF CONDITIONS . . . . .	141
§ 2. CLASSIFICATION OF CONDITIONS . . . . .	142
§ 3. CONDITIONS DISTINGUISHED FROM REPRESENTA- TIONS AND WARRANTIES . . . . .	149
§ 4. SUSPENSION AND DISCHARGE OF OBLIGATION BY CONDITIONS . . . . .	149
§ 5. CONDITIONS SUBSEQUENT IN FORM, PRECEDENT IN FACT . . . . .	150
§ 6. CONDITIONS AFFECTING RIGHT OF ACTION . . . . .	150
§ 7. CONCURRENT CONDITIONS . . . . .	151
§ 8. EXPRESS AND IMPLIED CONDITIONS . . . . .	151
§ 9. DEPENDENT AND INDEPENDENT PROMISES . . . . .	152
§ 10. INCONSISTENT DESCRIPTIONS . . . . .	160
§ 11. PERFORMANCE OF CONDITIONS . . . . .	162
§ 12. WAIVER OF CONDITIONS . . . . .	163
§ 13. EQUITABLE VIEW OF CONDITIONS . . . . .	167

### CHAPTER V.

#### THE CONSTRUCTION OF CONTRACTS.

§ 1. GENERAL RULES OF CONSTRUCTION . . . . .	169
§ 2. IMPOSSIBILITY . . . . .	174
(a) Legal Impossibility . . . . .	176
(b) Existence of Subject Matter . . . . .	177
(c) Bailment Contracts . . . . .	180
(d) Personal Contracts . . . . .	181
§ 3. REASONABLENESS . . . . .	182
§ 4. THE ESSENCE OF THE CONTRACT . . . . .	184
§ 5. PENALTIES AND LIQUIDATED DAMAGES . . . . .	189
§ 6. NOTICE . . . . .	190

## CHAPTER VI.

## THE STATUTE OF FRAUDS.

	Page
§ 1. INTRODUCTORY . . . . .	192
§ 2. CONTRACTS WITHIN THE STATUTE . . . . .	194
(a) Fourth Section . . . . .	194
(1) Executors and Administrators . . . . .	194
(2) Guaranties . . . . .	194
(3) Marriage Contracts . . . . .	200
(4) Concerning Lands . . . . .	200
(5) Performance within One Year . . . . .	201
(b) Seventeenth Section . . . . .	204
(1) "Contract for the Sale of" . . . . .	204
(2) "Goods, Wares, and Merchandises" . . . . .	205
(3) "For the Price of £10 Sterling and up- wards" . . . . .	206
§ 3. REQUIREMENTS OF THE STATUTE . . . . .	206
(a) Memorandum . . . . .	206
(b) Acceptance and Receipt . . . . .	210
(c) Earnest and Part Payment . . . . .	211
§ 4. EFFECT OF THE STATUTE . . . . .	211

## CHAPTER VII.

## THE OPERATION OF CONTRACT.

§ 1. AS TO OBLIGATIONS . . . . .	215
§ 2. AS TO RIGHTS . . . . .	216
(a) At Common Law and in Equity . . . . .	216
(b) Exceptions . . . . .	216
(c) Right of the "Beneficiary" to Sue . . . . .	217
(1) Cases in which such Right is Recog- nized . . . . .	217
(2) Nature of such Right . . . . .	223
(d) Doctrine of the Federal Courts . . . . .	226

CHAPTER VIII.

RESCISSION OF CONTRACT.

	PAGE
§ 1. INTRODUCTORY . . . . .	229
§ 2. CAUSES FOR RESCISSION . . . . .	230
(a) Facts Prejudicially Affecting Motives in Legal Contemplation . . . . .	231
(1) Infancy . . . . .	231
(2) Mental Incapacity . . . . .	233
(b) Facts Prejudicially Affecting Motives to the Knowledge of the Other Party . . . . .	234
(1) Mental Incapacity . . . . .	234
(2) Misunderstanding . . . . .	237
(a) Common to Both Parties . . . . .	237
(1) As to the Terms of the Contract . . . . .	238
(2) As to the Subject- Matter . . . . .	243
(b) Of one Party Only . . . . .	245
(1) Not Known to the Other . . . . .	245
(2) Known to the Other . . . . .	246
(a) Not Caused by the Other Party — Mistake . . . . .	246
(b) Caused by the Other Party — Misrepresentation and Fraud . . . . .	247
(3) Duress . . . . .	255
(4) Unfair Dealing . . . . .	259
§ 3. HOW RESCISSION IS EFFECTED . . . . .	260
(a) Modes of Rescission . . . . .	260
(b) Requisites of Rescission . . . . .	262
§ 4. HOW THE RIGHT OF RESCISSION IS LOST . . . . .	265
(a) Ratification . . . . .	265
(b) Laches . . . . .	269
(c) Statutes of Limitations . . . . .	270



## CHAPTER IX.

## THE ASSIGNMENT OF CONTRACT.

	Page
§ 1. AT COMMON LAW . . . . .	271
§ 2. IN EQUITY . . . . .	271
§ 3. NEGOTIABILITY . . . . .	275
§ 4. ASSIGNMENT BY OPERATION OF LAW . . . . .	276
(a) By Death . . . . .	276
(b) By Marriage . . . . .	277
(c) By Bankruptcy and Insolvency . . . . .	277
(d) By the Transfer of Land . . . . .	277

## CHAPTER X.

## THE DISCHARGE OF CONTRACT.

§ 1. PERFORMANCE . . . . .	278
§ 2. TENDER . . . . .	279
§ 3. INTERNAL CONDITIONS SUBSEQUENT . . . . .	280
§ 4. EXTERNAL CONDITIONS SUBSEQUENT . . . . .	281
(a) Waiver . . . . .	281
(b) Gift . . . . .	281
(c) Release . . . . .	282
(d) New Contract . . . . .	283
(e) Breach of Contract . . . . .	285
(f) Repudiation . . . . .	287
(g) Failure of Consideration . . . . .	289
(h) Alteration or Loss of a Written Instrument . . . . .	292
(i) Merger and Estoppel . . . . .	294
§ 5. DISCHARGE OF RIGHT OF ACTION FOR BREACH OF CONTRACT . . . . .	295
(a) Internal Conditions Subsequent . . . . .	295
(b) External Conditions Subsequent . . . . .	295
(1) Accord and Satisfaction . . . . .	296
(2) Arbitration and Award . . . . .	297
(3) Statutory Discharges . . . . .	298

CONTENTS.

xix

CHAPTER XI.

THE ENFORCEMENT OF CONTRACT.

	PAGE
§ 1. SANCTIONS . . . . .	299
§ 2. REMEDIES . . . . .	300

---

INDEX . . . . .	309
-----------------	-----

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## ABBREVIATIONS.

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THE following abbreviations, in addition to those in common use, have been used in this book:—

<b>A.</b>	. . . . .	Atlantic Reporter.
<b>C. C. A.</b>	. . . . .	Circuit Court of Appeals Reports.
<b>Ewell's L. C.</b>	. . . . .	Ewell's Leading Cases on Infancy, Cover- ture, etc.
<b>F.</b>	. . . . .	Federal Reporter.
<b>H. &amp; W.</b>	. . . . .	Huffcut and Woodruff's American Cases on Contract.
<b>L.</b>	. . . . .	Langdell's Cases on Contracts.
<b>N. E.</b>	. . . . .	Northeastern Reporter.
<b>N. W.</b>	. . . . .	Northwestern Reporter.
<b>P.</b>	. . . . .	Pacific Reporter.
<b>S.</b>	. . . . .	Southern Reporter.
<b>S. E.</b>	. . . . .	Southeastern Reporter.
<b>S. W.</b>	. . . . .	Southwestern Reporter.
<b>W.</b>	. . . . .	Williston's Cases on Contracts.
<b>W. C. S.</b>	. . . . .	Williston's Cases on Sales.



## TABLE OF CASES.

	Page		Page
ABBOTT v. Doane	74, 76	Anderson v. Hayman	200
v. Inskip	212	v. May	179
Abbot Walter v. Baillol	17	v. Soward	267
Ackert v. Barker	111, 128	v. Spence	196
Adam v. Newbigging	264	Andrews v. Franklin	141
Adams v. Coulliard	126	Angell v. Duke	62
v. Jones	87	Angle v. Chicago, &c. Ry. Co.	215
v. Kuehn	216	Anglo-Egyptian Nav. Co. v.	
v. Lindsell	98	Rennie	180
v. Nichols	179	Anheuser-Busch Br'g Ass'n	
v. Schiffer	256	v. Mason	126
Adams Radiator Works v.		Ankeny v. Clark	187
Schrader	184	Appleby v. Myers	180
Ahern v. Ayres	45	Archer v. California Lumber	
Ahl v. Johnson	213	Co.	87
Aiken v. Blaisdell	102, 126	Arkansas Valley Smelting	
Alabaster v. Harness	109, 110	Co. v. Belden Mining Co.	278
Alden v. Hart	147	Armstrong v. American Ex-	
Aldrich v. Ames	196	change Bank	126
Alexander v. Haskins	235	Arnold v. Nichols	219
Alger v. Thacher	120	v. Richmond Iron Works	268
Allard v. Lamirande	111	Arnot v. Coal Co.	122
Allen v. Chouteau	52	Ashmead v. Reynolds	234
v. Duffle	79	Asiatic Banking Ass'n, Ex	
v. Hammond	187	parte	275
v. Harris	296	Atkins v. Barnstable	163
v. Hartfield	251	Atkinson v. Denby	129
v. Rescous	102	v. Smith	159
Aller v. Aller	283	Atwood v. Cobb	208
Allore v. Jewell	259	Austin v. Hall	138
Alpaugh v. Wood	140	Averill v. Hedge	93
Alsop v. Riker	270	Avery v. Bowden	288, 289
Alvord v. Smith	117	Ayerst v. Jenkins	114, 128
American Cotton Oil Co. v.			
Kirk	62	BABCOCK v. Hawkins	296
American Express Co. v.		v. Terry	125
Pinckney	174	Badische Anilin Fabrik v.	
American Mtg. Co. v. Wright	267	Schott	121
Ames v. Belden	181	Bagster v. Earl of Portsmouth	235
Amsinck v. American Ins. Co.	212		

	Page		Page
Bailey v. Austrian	61, 62	Beecher v. Conradt	155
v. Cromwell	180	Behn v. Burness	142, 145, 161,
v. R. R. Co.	171		175, 186
Baily v. De Crespigny	176	Belger v. Dinsmore	49
Bainbridge v. Firmstone	55	Bell v. Campbell	129
Baird v. U. S.	66	v. Leggett	103
Baits v. Peters	294	v. Stocker	277
Baker v. Bryan	223	Bellows v. Sowles	194
v. Holt	92	Benge v. Hiatt	58, 218
v. Maxwell	268	Bennett v. Collins	267
Balday v. Parker	206	Bent v. Cobb	210
Baldwin v. Williams	205	Beresford v. Goodrouse	190
v. Van Deusen	59	Bergen v. Ebey	239
Baldy v. Stratton	114	Berkshire Life Ins. Co. v.	
Bank v. Kennedy	173	Hutchings	226
Bank of Australasia v. Breil-		Bernard v. Taylor	116, 129, 130
lat	134	Berry v. Brown	222
Bank of China v. American		Bestor v. Wathen	109
Trading Co.	158	Beveridge v. N. Y. El. R. Co.	221
Bank of Columbia v. Patter-		Bibb v. Allen	117, 207
son	294	Bierbauer v. Wirth	112
Bank of Hindostan v. Smith	293	Signall v. Gould	189
Banorgee v. Hovey	294	Bill v. Bament	210
Barker v. Barker	111	Bingham v. Bingham	187
v. Hodgson	177	Birch v. Earl of Liverpool	202
Barlow v. Ocean Ins. Co.	68	Bird v. Munroe	210, 211
Barnard v. Kellogg	170, 171	Bisbee v. McAllen	102
Barnes v. Barnes	41	Bishop v. Allen	86
v. Hekla Ins. Co.	219	v. Busse	70
v. Smith	117	v. Eaton	88, 94
v. Strong	110	v. Palmer	121, 128, 133
Barnett v. Juday	140	Bixby v. Mow	183
v. Speir	269	Black v. Wabash	86
Barrett v. Buxton	236	Blackstock v. N. Y. & E. R.	
Barrie v. Earle	265	R. Co.	183
Barry v. Capen	108	Blagden v. Bradbear	209
Bartholomew v. Jackson	44	Blaisbell v. Ahern	110
Bartle v. Nutt	181	Blake v. Voight	202
Bartlett v. Blaine	103	Blakely Ordnance Co., <i>In re</i>	275
Barton v. Benson	104	Blake's Case	297
Bascom v. Smith	88	Blewitt v. Boorum	41
Bassett v. Brown	265	Bliss v. N. Y. & C. R. R. Co.	37
v. Hughes	219, 225, 226	Bliven v. New England Screw	
Bateman v. Phillips	207	Co.	170, 171
Bates v. Ball	237	Blood v. Wilson	163
Batterbury v. Vyse	164	Bloomer v. Nolan	266
Batty v. Marriott	118	Blossom v. Dodd	49
Bay v. Williams	223, 225	Boardman v. Reed	172
Bayley v. Bailey	123	Boast v. Firth	181
Beach v. First M. E. Church	99	Bock v. Perkins	172
Beadles v. Bless	115	Bohanan v. Pope	224
Bean v. Burbank	97, 98	Boigneres v. Boulon	114
Beckwith v. Talbot	51, 207	Boit v. Maybin	86

## TABLE OF CASES.

XXV

	Page		Page
Bona's Appeal	116	Brown v. First Nat. Bank	113
Booth v. Wiley	65	v. Foster	184
Borchsenius v. Canutson	197	v. Guarantee Trust Co.	185
Borden v. Boardman	216	v. Hartford Fire Ins. Co.	260
v. Richmond, &c. R. R. Co.	245	v. Langley	51
Boston & Lowell R. R. v.		v. Muller	288
Nashua, &c. R. R. Co.	298	v. Nealley	103
Boston & Maine R. R. Co.	96, 97	v. Stillman	220, 221
Boston Ice Co. v. Potter	44	v. Whipple	207
Bostwick v. Bostwick	45	Brumby v. Smith	180
Bowditch v. New England Mut. Life Ins. Co.	102	Bryant v. Isburgh	162, 281
Bowen v. Hall	215	v. Peck & Whipple Co.	258
Bowery Nat. Bank v. Wilson	107	Bryant's Pond Co. v. Felt	80
Bowes v. Shand	186	Buchanan v. Hubbard	265
Bowman v. Hiller	258	Buckstaff v. Russell	280
v. Phillips	112	Bunn v. Winthrop	114
v. Stewart	166	Bunting v. Darbyshire	198
Boyce v. Smith	236	Burchell v. Marsh	298
Boyd v. Hitchcock	66	Burdett v. Williams	233
v. Paul	200	Burke v. Allen	234
Boydell v. Drummond	207	v. Gould	257
Boyden v. Boyden	266	Burnes v. Scott	111
Boylan v. Hot Springs R. R. Co.	48	Burr v. Beers	219
Boyson v. Thorn	215	Burtis v. Thompson	165, 288
Bradford v. Roulston	88	Burton v. Larkin	221
Bradley v. King	287, 288	Bush v. Breinig	236
Bradner v. Roffsell	166	Buswell v. Fuller	282
Brady v. Finn	253	Bute v. Thompson	178
Bragg v. Danielson	284	Butler and Baker's Case	42
v. Wetzell	137	Butler v. Wigge	172
Braman v. Bingham	41	Butterfield v. Byron	179
Brassell v. Williams	66	v. Hartshorn	223
Brewer v. Maurer	221, 226	Byrne v. Van Tienhoven	96
Brewster v. Brewster	260	CABOT v. Christie	255
Briggs v. Sizer	92	Cage v. Acton	150
Bristol Aërated Bread Co. v. Maggs	51	Cahen v. Platt	163, 286
British Waggon Co. v. Lea	272	Caines v. Smith	164, 288, 303
Brock v. O'Dell	242	Caledonian Ins. Co. v. Gil-mour	114, 151
Brogdon v. Metropolitan Ry. Co.	86	Callanan v. Chapin	207
Brooks v. Ball	57	Callisher v. Bischoffsheim	68
v. Martin	132	Cambefort v. Chapman	139
v. White	66	Camden & Amboy R. R. Co. v. Baldauf	49
Brophy v. Lawler	268	Campbell v. Jones	156
Brown v. Bigné	110	v. Smith	219
v. Bryne	170	Canal Co. v. Ray	285
v. Duncan	102	Cann v. Cann	45
v. Eastern R. R. Co.	49	Cannan v. Bryce	126
v. Farmers', &c. Bank	195	Carleton v. Whitcher	133
		v. Woods	133



	Page		Page
Carlill v. Carbolic Smoke Co.	58	Cincinnati v. Cincinnati Gas-	
Carlson v. Segog	264	light Co.	172, 173
Carpenter v. Carpenter	233	City Nat. Bank v. Kusworm	258
v. Cresswell	156	Clafin v. Olstrom	222
v. Rodgers	268	Clapp v. Hoffmann	187
Carrell v. Potter	267	Clark v. Busse	179
Carrier v. Sears	234	v. Franklin	179
Carter v. Holahan	220, 221	v. Marsiglia	304
v. Mayor of Albany	225	v. Pendleton	200
v. Silber	263	v. Van Court	267
v. United Ins. Co.	274	Clarke v. Watson	166
Cartwright v. Cartwright	115	v. White	297
Castlegate Stp. Co. v. Demp-		Clason v. Bailey	209, 210
sey	183	Clay v. Yates	102
Catlin v. Haddex	267	Clayton v. Andrews	204
Cecil v. Spurger	248	Cleary v. Sohler	179
Central Shade Roller Co. v.		Clements v. London & N. W.	
Cushman	122, 123	Ry. Co.	232
C. F. Jewett Publishing Co.		Cleveland Rolling Mill v.	
v. Butler	125	Rhodes	157, 186
Chalfant v. Payton	119	Clifford v. Luhning	199
Chamber of Commerce v.		v. Watts	35, 175, 178
Sollitt	288	Clough v. Giles	223
Chamberlain v. Grimes	111	v. Seay	293
v. Williamson	277	Clymer v. De Young	197
Chambers v. Baldwin	215	Cole v. Cassidy	255
Champion v. Plummer	207	v. Gibson	119
v. Ulmer	36	Coleman v. Applegarth	96
Chase v. Fitz	200	v. U. S.	45
v. Lowell	210	v. Whitney	219
Chatham Furnace Co. v.		Collins v. Locke	123
Moffatt	255	Collyer v. Moulton	283
Cheney v. Cook	97	Comer v. Grannis	245
v. Libby	185	Comley v. Dazian	226
Cherry v. Heming	40	Comings v. Heard	298
Chesebrough v. Conover	108	Commonwealth v. Hunt	123
Chesman v. Nainbry	135	Compton v. Bunker Hill	
Chicago v. Sheldon	172	Bank	258
Chicago, &c. Ry. Co. v.		Condict v. Flower	293
Dane	62, 64	Cone v. Russel	105
v. Lewis	287	Conley v. Nailor	237
Chicago Attachment Co. v.		Conly v. Coffin	252
Davis S. M. Co.	212	Conn v. Thirnton	141
Chicago B. & Q. R. Co. v.		Connerat v. Goldsmith	195
Bell	124	Connihan v. Thompson	269
Chicago M. & St. P. Ry. v.		Connor v. Black	116
Hoyt	175, 176	v. Stanley	236
Chicago & S. F. R. R. Co. v.		Conrad v. Lane	233
Price	166, 167	Conrow v. Little	269
Chism v. Shipper	167	Consumers' Oil Co. v. Nun-	
Chrysler v. Canaday	252	nemaker	121, 134
Church v. Fowle	293	Cook v. Bradley	84
v. Proctor	104, 125	v. McCabe	180

## TABLE OF CASES.

xxvii

	Page		Page
Cook v. Wright	68	Davenport v. First Congrega-	74
Cooke v. Millard	205	tional Society	208
v. Murphy	70, 71	Davey v. Shannon	283
v. Oxley	97	Davidson v. Cooper	121
Coombe v. Greene	158	Davies v. Davies	32, 120, 121
Cooper v. Coates	805	v. Stowell	109
v. Cooper	45	Davis v. Davis	98
v. Lansing Wheel Co.	68, 64	v. Patrick	198
v. Phibbs	187	v. Rice	257
Cope v. Rowlands	102	v. Seeley	105
Cordes v. Miller	177	v. Shields	209
Cort v. Ambergate Ry. Co.	165	v. Snider	35
v. Lassard	307	v. Wells	86, 87, 174
Coster v. Mayor of Albany	218	Davis Sewing Machine Co. v.	87
Cottage St. Church v. Kendall	80	Richards	142, 145
Cotten v. McKenzie	133	Davison v. Von Lingen	160, 161, 175, 187
Cotterill v. Stevens	211	Dawe v. Morris	250
Couturier v. Hastie	144, 145, 160, 175, 187, 244	Dawkins v. Sappington	80
Cowan v. Milbourn	125	Day v. Caton	44
Coyner v. Lynde	71	v. Leal	294
Craft v. McCoughy	181	v. McLea	296
Craighead v. Wells	262	Dean v. Emerson	135
Crandall v. Gosnell	223	v. Newhall	283
Craus v. Hunter	68	v. Walker	221
Crears v. Hunter	69	Dearborn v. Bowman	83
Creswell Ranch Co. v. Mar-		Dearle v. Hall	275
tindale	167, 186	Debenham v. Ox	120
Cristie v. Borelly	157	Decker v. Livingston	188
Crisup v. Grosslight	112	Deering v. Chapman	133
Cromwell v. Tate	41	De Francesco v. Barnum	282
Cross v. Cross	115	De Groot v. United States	297
Crossley v. Maycock	52, 92	Delamater v. Miller	164, 288, 303
Crouch v. Credit Foncier	170, 272	Delano v. Blake	266
v. Gutman	187, 168	Delavina v. Hill	126
Cummings v. Arnold	278, 284	Delaware County v. Diebold	278
Cunningham v. Fourth Bap-		Safe Co.	117
tist Church	177	Delier v. Agricultural So-	236
Curtis v. Brown	197	ciety	804
v. Innerarity	305	Dennett v. Dennett	179
v. Sage	204	Derry v. Peek	254, 255
Cutter v. Powell	162	Derry Bank v. Webster	42
		Devecmon v. Shaw	57
DALE v. Hamilton	201	Dewey v. Alpena School Dis-	182
v. Lincoln	42	trict	195
Dalzell v. Dueber Mfg. Co.	205	Dexter v. Blanchard	235
Daniels v. Newton	165, 303	v. Hall	178
Dartmouth College v. Wood-		v. Norton	
ward	4	Diamond Match Co. v. Roe-	
Dater v. Earl	126	ber	120, 121
Daub v. Englebach	219		
Daughish v. Tennent	103		

	Page		Page
Dicker v. Johnson	164	Eberstein v. Willets	256
Dickinson v. Burrell	111	Ecker v. McAllister	68
v. Calahan	276	Eddy v. Capron	107
v. Dodds	96, 97	v. Davis	155
v. Lee	258	Eden v. Chaffee	196
Dickson v. Frisbee	204	Edgerton v. Weaver	69
Dieckhoff v. Fox	125	Edmonston v. Drake	87
Diggle v. Higgs	118	Edwards v. Carter	263
Dill v. White	140	v. Pyle	292
Dingley v. Oler	288	Egerton v. Earl Brownlow	124
Dinwiddie v. Self	241	v. Mathers	209
District of Columbia v. Gal-		Eliaison v. Henshaw	93
lagher	172	Eller v. Lacy	139
Dixon v. Clarke	280	Ellerman v. Chicago Junc-	
Doane v. Chicago City Ry.		tion Ry. Co.	121
Co.	109	Elliott v. Bell	139
v. Lockwood	264	v. Caldwell	162
Dobson v. Collis	202	Ellis v. Johnson	219
Dodge v. Moss	226	Elting v. Vanderlyn	69
Doll v. Noble	184	Embrey v. Jemison	116, 127
Donaldson v. Farwell	250	Emerson v. Heelis	206
Donellan v. Read	204	v. Slater	198
Donohue v. Woodbury	66	Emery v. Ohio Candle Co.	121
Doty v. Wilson	84	v. Smith	212
Dougherty v. Catlett	200	Emmitt v. Brophy	219
Douglass v. Reynolds	87, 89	Empress Engineering Co.,	
Doyle v. Dixon	203	In re	216
v. Trinity Church	256	Endriss v. Belle Isle Ice Co.	71
Drake v. Mitchell	139	England v. Davidson	64
Draughan v. Bunting	195	Eposito v. Bowden	177
Drew v. Nunn	99	Equitable Co-op. Foundry v.	
Driver v. Broad	201	Hersee	268
Dublin & Wicklow Ry. v.		Erie Ry. Co. v. Union Loco-	
Black	268	motive Co.	135
Duncan v. Charles	156, 158, 160,	Ernest M. Munn	264
v. Willis	292	Essex v. Day	240
Dunham v. Griswold	139	Evans v. Huey	258
Dunton v. Dunton	257	v. McCormick	87
Duplex Safety Boiler Co. v.	32	v. Powis	296
Garden	184	v. Rothschild	269
Durnherr v. Rau	220	v. Trenton	131
Dusenbury v. Hoyt	81	v. Ware	282
Dutchman v. Tooth	61	Everson v. Carpenter	268
Duval v. Wellman	129, 131	v. International Granite	
Dyer v. Sutherland	138	Co.	246
		Ewing v. Burnett	174
		Exchange Bank v. Rice	216
EAGLESFIELD v. London-			
derry	251	FAIRPLAY School Tp. v.	
Eames v. Preston	41	O'Neal	81
Earle v. Angell	58	Fallowless v. Taylor	112
Eastwood v. Kenyon	84	Farni v. Tesson	187, 139

## TABLE OF CASES.

xxix

	Page		Page
Farrow v. Wilson	181	Fowler v. Black	242
Farwell v. Hanchett	251	v. Brooks	65
v. Lowther	209	v. Fowler	238
Fawcett v. Freshwater	65	Fox v. Davis	115
Featherstone v. Hutchinson	124, 133	Frank v. Eltringham	208
	240	Franklin v. Miller	157
Fehlberg v. Cosine	232	Franks v. Jones	237
Fellows v. Wood	28	Freeman v. Bernard	298
Felthouse v. Bindley	267	v. Freeman	45
Felton v. Wiseman	118	v. Taylor	186
Ferguson v. Coleman	265	Freeth v. Burr	157
Fewell v. Deane	180	French v. Ryan	250
Field v. Brackett	273, 274	Freyman v. Knecht	161, 281
v. Mayor	133	Friend v. Miller	112
Filson v. Himes	213	Fritzler v. Robinson	187
Finch v. Finch	86	Frost v. Clarkson	116
v. Mansfield	68	v. Gage	103, 128
Fink v. Smith	66, 69	v. Knight	165, 288, 289, 303
Fire Ins. Assoc'n v. Wick-	195	Ft. Payne Coal & Iron Co.	
ham	196	v. Webster	160, 292
First Nat. Bank v. Bennett	89	Fugate v. Hansford	208
v. Chalmers	251	Fuller v. Dame	109
v. Watkins	228	v. Kemp	296
Fish v. Cleland	128		
v. Glover	183	GABLE v. Morse	191
Fisher v. Bridges	80	Gage v. Lewis	251
v. Chadwick	219	Gaines v. Poor	115
Fitch v. Snedecker	116, 117	Gamewell Fire Alarm Tel.	
Fitzgerald v. Barker	221	Co. v. Crane	122
Flagg v. Baldwin	277	Garberino v. Roberts	288
v. Manhattan Ry. Co.	296	Garbracht v. Commonwealth	86
Fleet v. Perrins	82	Garbutt v. Watson	204
Flegal v. Hoover	219	Gardner v. Gardner	40
Flight v. Reed	112	Gardon v. Manchester	47
Flint v. Cadenasse	66	Garrard v. Frankel	240, 246
Flower v. Sadler	44	Garrett v. Trabue	95, 98
Foakes v. Beer	107	Garrison v. U. S.	172
Fogg v. Portsmouth Athen-	133	Garvin v. Mobley	225
æum	49	Gaskell v. King	173
Foley v. Platt	172, 283	Gaylord v. Soragen	126
v. Speir	265, 267	Geipel v. Smith	150
Fonseca v. Cunard S. S. Co.	288	Geismer v. Lake Shore & M.	
Ford v. Beech	286	S. R. Co.	183
v. Phillips	275	Gelpe v. Dubuque	184
v. Tiley	281	George v. Tate	261
Forsyth v. Hastings	36	Gerli v. Poidebard Mfg. Co.	157, 166, 186
Foster v. Cockerell	68	Gibbons v. Gouverneur	118
v. Dawber	126	v. Proctor	80
v. Mackinnon	191	v. Vouillon	282
v. Metts	121	Gibbs v. Baltimore Gas Co.	121
v. Thurston		v. Smith	104
Fowle v. Haggard			
v. Park			

	Page		Page
Gibson v. Pelkie	244	Griel v. Lomax	252
v. Soper	263	Griffin v. O'Neil	245
Gifford v. Corrigan	219, 225, 228	Grigsby v. Stapleton	248
Gillett v. Logan County	112	Griswold v. Hayward	242
Gilman v. Rives	137	Guernsey v. Cook	105
Gilmore v. Courtney	166	Guild v. Butler	66
Glaholm v. Hays	186	v. Conrad	195
Glaspie v. Keator	255	Guthing v. Lynn	32
Glass v. Hulbert	213		
v. Murphy	105		
Glaze v. Duson	133	HAAS v. Kansas City, &c. R.	
Glazebrook v. Woodrow	158	Co.	183
Gleason v. Dyke	84	Hackley v. Headley	256
Glenn v. Marbury	271	Hadley v. Baxendale	304
Gobble v. Linder	190	v. Clarke	150
Goddard v. Binney	205	Haigh v. Brooks	57, 60
Goebel v. Lynn	70	Hale v. Gerrish	265, 267
Goetter v. Pickett	36	v. Trout	164
Gold v. Phillips	196	Hall v. Perkins	160
Goldman v. Oppenheim	104	v. Solomon	201
Goldsborough v. Orr	156	Hall Lumber Co. v. Gastin	257
Good v. Cheesman	77, 296	Hallenbeck v. Dewitt	36
Good Fellows v. Campbell	66	Halstead v. Grinnan	270
Goodrich v. Tenney	112	Halsted v. Francis	216
Goodsell v. Myers	267	Hamblin v. Bishop	187
Gordon v. Butler	252	Hamer v. Sidway	58
v. Parmelee	252	Hamilton v. Gray	111
v. Third Nat. Bank	293	v. Liverpool Ins. Co.	114, 151
Gore v. Gibson	236	Hampden v. Walsh	180
Gorringe v. Irwell Works	274	Hanauer v. Doane	125
Goss v. Lord Nugent	284	v. Gray	173
Gould v. Cayuga Bank	260	Handforth v. Jackson	265
Goulding v. Davidson	85	Hanger v. Abbott	177
Gowen v. Klous	207	Hanks v. Brown	105
Grace v. Lynch	204	Hanover Nat. Bank v. Blake	103
Graces v. Johnson	125	Hansard v. Robinson	293
Grandin v. Grandin	68	Hanson v. Marsh	209
Grant v. Johnson	154, 155	Harbor Bros. Co. v. Moffat	
Gray v. Gardner	150	Cycle Co.	163, 287, 288
v. Hook	106	Harding v. Harding	273
v. Smith	201	Harmer v. Killing	267
Great Berlin Steamboat Co.,		Harnis v. McCormick	225
In re	130	Harriman v. Harriman	66
Great Northern Ry. Co. v.		Harrington v. Higgins	155
Witham	63, 64	v. Klopogge	173
Green v. Collins	126	Harris v. Great Western Ry.	
v. Langdon	282	Co.	48
Greenup v. Stoker	165	v. Nickerson	46
Greenwood v. Bishop of Lon-		v. Scott	92
don	135	v. Venables	69
v. Law	205	v. White	117, 118
Gregory v. Lee	232	Harrison v. Muncaster	176
Grice v. Noble	28	Harris's Case	94

## TABLE OF CASES.

xxx

	Page		Page
Hart v. Hart	31	Hill v. Hooper	203
v. Miles	59	Hinckley v. Pittsburg Steel	
Hartley v. Varner	199	Co.	164, 165
Hartshorn v. Day	261, 291	Hinely v. Margaritz	267
Hartwell v. Hartwell	107	Hinnen v. Newman	104
Harvey v. Facey	46	Hitchcock v. Coker	120
v. Merrill	115, 116, 127, 128	Hoadley v. M'Laine	208
v. Murray	180	Hoare v. Rennie	157, 186
Hastings v. Lovejoy	285	Hobbs v. Maasasoit Whip Co.	23
Hatchett v. Molton	95	Hochster v. De la Tour	288, 303
Hatton, <i>In re</i>	297	Hockenbury v. Meyer	69
Hausman v. Burnham	201	Holdipp v. Otway	153
Havelock v. Geddes	163	Holladay v. Paterson	124
Haverleigh v. Leighton	191	Hollis v. Chapman	179
Haviland v. Willets	251	Holmes v. McCray	201
Hawkins v. Chace	210	Holst v. Stewart	253, 254
v. Graham	184	Holt v. Rogers	171
v. Hawkins	86	v. Ward Clarendieux	59, 119
Hayden v. Bradley	190	Honck v. Muller	157, 174, 186
Hayes v. Hayes	123	Honeyman v. Marryatt	92
v. Jackson	209	Hood v. Hartshorn	114, 151
v. Phillips	201	Hopkins v. Logan	83
Hays v. Midas	268	Horschfeld v. London, &c.	
Hayward v. Andrews	274	Ry. Co.	37
v. Barker	84, 85	Horton v. Bloedon	257
v. Leonard	162	Hosler v. Hursh	296
Hazard v. Griswold	36	Hostetter v. Park	170, 171
Head v. Tattersall	280	Hotson v. Browne	51
Headley v. Shaw	156, 158	Household Fire Ins. Co. v.	
Hearne v. Marine Ins. Co.	239	Grant	94, 95
Hecht v. Batcheller	244	Houser v. Planters' Bank	82
Helfenstein's Estate	98	Howard v. Daly	95
Hemmenway v. Stone	140	v. Easton	200
Henderson v. Palmer	112	v. First Church	108
v. Stevenson	49	Howden v. Haigh	104
v. Welch	272	Howe v. North	45
Henderson Bridge Co. v. Mc-		v. Taggart	69
Grath	81	Howell v. Coupland	178
Hendrick v. Lindsay	226	v. Stuart	126
Hennessy v. Metzger	189	Hoyle, <i>In re</i>	206
Henninger v. Heald	264	Huckins v. Hunt	103
Henry v. Root	266	Hudson, <i>In re</i>	78
Henthorn v. Frazer	94, 96, 97	v. Revett	41
Herbert v. Turball	231	Hudson Real Estate Co. v.	
Herman v. Jeuchner	113, 130	Tower	80
Herreshoff v. Boutineau	120	Hugall v. McLean	191
Hewett v. Currier	68	Hughes v. Wamsutta Mills	177
Hick v. Raymond	182	Humble v. Mitchell	205
Hickman v. Haynes	285	Hume v. U. S.	247
Higert v. Trustees	79	Hunnewell v. Duxbury	253
Higgins v. Brown	257	Hunt v. Livermore	12, 160, 172,
Higginson v. Weld	190		292
Hill v. Grigsby	155, 160	v. Rousmaniere	242

	Page		Page
Hunter v. Nolf	106	Jourdain v. Fox	213
Huscombe v. Standing	258	Joy v. St. Louis	171, 174
Hussey v. Horne-Payne	51	Judd v. Harrington	122
Hutchinson v. Hutchinson	202	Judson v. Bowden	156
Hutley v. Hutley	110	v. Corcoran	275
Hynds v. Hays	133, 136	Judy v. Louderman	55
		Justice v. Lang	59, 210
ILLINOIS Land & Loan Co.			
v. Speyer	111	KADISH v. Young	288, 304
Isley v. Jewett	81	Kalkhoff v. Nelson	181
Imperial Loan Co. v. Stone	29, 99, 235	Kane v. Hood	156, 158
Ins. Co. v. Bachler	114	Kearley v. Thomson	130
v. Mowry	50	Keck v. Hotel Owners' Ins. Co.	296
Iondes v. Pacific Ins. Co.	90	Keeler v. Herr	162
Irwin v. Williar	115, 171	Keightley v. Watson	139
Isaacson v. Harwood	294	Keir v. Leeman	112
JACKSON v. Armstrong	252	Keller v. Ashford	224, 227
v. McLean	131	Kellogg v. Olmsted	65
v. Union Ins. Co.	150	Kelley v. Trumble	293
Jackson Iron Co. v. Negau-		Kelly v. Kelly	111
nee Concentrating Co.	204	v. Stone	86
Jaffray v. Davis	66	Kelsey v. Gibbs	198
James v. Burchell	164, 288	Kemble v. Farren	189, 190
v. Isaacs	297	Kendall v. Hamilton	138, 140
v. Newton	273	v. May	236
Jansen v. Grimshaw	138	Kendrick v. Neisz	267, 268
Jefferson v. Asch	222	Kennedy v. Baker	266
Jell v. Douglass	138	Kerrison v. Cole	132
Jenness v. Wendall	206	Kihlberg v. U. S.	166
Joest v. Williams	263	Kimball v. Cuddy	236
Johnson v. Bamberger	220	King v. Atkins	191
v. Dodgson	209	v. Duluth M. & N. Ry. Co.	71, 302
v. Hudson	102	v. Edmiston	199
v. Hunt	119	v. Hoare	138
v. Otterbein University	78	v. State Mut. Ins. Co.	116
v. Sellers	74	v. Summitt	195
Johnson-Brinkman Co. v.		v. Welcome	212
Missouri Pac. Ry. Co.	269	Kingsbury v. Sargent	257
Johnstone v. Milling	165, 287, 288	Kingston v. Preston	153
Jones v. Bacon	196	Kirkland v. Dinsmore,	50
v. Barkley	153, 165	Kitching v. Hicks	133
v. Daniel	92	Klein v. Ins. Co.	185
v. Houghton	257	Kneetle v. Newcomb	123
v. Perkins	66	Knight v. Cooley	46
v. Rice	112	Knox v. Knox	237
v. Stanley	215	Kraus v. Thompson	268
v. Swayze	42	Kromer v. Heim	296
Jordan v. Kavanaugh	223	Kruschke v. Stefan	257
Joslin v. New Jersey Car Spring Co.	225		

## TABLE OF CASES.

xxxiii

	Page		Page
LACY v. Getman	181	Lingenfelder v. Wainwright	
Ladies' Collegiate Inst. v. French	78	Brewing Co.	70, 302
Laidlaw v. Organ	248	Linneman v. Moross	216
Laird v. Pim	146, 165	Little v. Banks	218
Lake Ontario R. R. Co. v. Curtis	221	Livingston v. Ralli	113
Lakeman v. Pollard	182	Llano Improvement Co. v. Pacific Imp. Co.	68
Lamb v. Lathrop	280	Lloyd v. Jewell	291
Lambert v. Heath	290	London, Chatham & Dover Ry. Co. v. South-Eastern Ry. Co.	305
Lamberton v. Dunham	255	London & N. W. Ry. v. M' Michael	263
Lamplough v. Brathwait	83	Loneragan v. Buford	256
Lampman v. Cochran	190	Long v. Woodman	250, 252
Lancaster County Bank v. Moore	235	Longshore Printing Co. v. Howell	123
Landa v. Shook	181	Longworth v. Mitchell	93
Langdon v. Hughes	196	Lord v. Goddard	255
Lange v. Werk	121	Lorillard v. Clyde	220
Larned v. Andrews	102	Loring v. Boston	93
Lasher v. M'Creery	270	Loud v. Pomona Land Co.	153, 154
Lathrop v. Knapp	79	Louisville, N. A. & C. Ry. Co. v. Herr	234
Lattimore v. Harsen	70	Louisiana v. New Orleans	4
Lavery v. Pursell	213	Love v. Harvey	116
Law v. Redditch	189	Loveren v. Loveren	115
v. Grant	248	Low v. Peers	119
Lawrence v. Fox	217, 218, 226	Lowber v. Bangs	172, 186
v. McArter	231	Luce v. Foster	133
v. McCalmont	60, 61	Ludlow v. Hardy	82
v. Stag	187	Lumley v. Gye	215
Lawson v. Lovejoy	266	v. Wagner	300, 307
Layton v. Pearce	174	Lunn v. Shermer	248
Leal v. Terbush	187	Lyle v. Rodgers	297
Leather Cloth Co. v. Hieronimus	278, 285	Lyman v. Lincoln	222
Leavitt v. Dover	72, 179		
Lee v. Dick	87		
v. Griffin	205		
v. Muggeridge	84	McCANDLESS v. Allegheny Steel Co.	65
Lehigh Zinc Co. v. Bamford	252, 255	McCarren v. McNulty	184
Lemon v. Grosskopf	131	McClair v. Wilson	257
Leroux v. Brown	211	M'Comb v. Wright	210
Lester v. White	200	McConahey v. Griffey	202
Lewis's Estate, <i>In re</i> ,	282	McCormick v. Gray	297
Lewis v. Bannister	255	McCormick, &c. Co. v. Hamilton	258
v. Browning	93	M'Cowan v. Baine	170
Lilly v. Waggoner	237	McCreery v. Dav	283, 285
Lincoln v. Buckmaster	235	McCrillis v. Carlton	265
Lincoln Shoe Mfg. Co. v. Sheldon	147	M'Culloch v. Eagle Ins. Co.	94
Lindell v. Rokes	58	McGarvy v. Roods	45
Lindsay v. Smith	136	McGinnis v. Fernandes	212



	Page		Page
Macgregor v. Macgregor	203	Maynard v. Tabor	92
McGrew v. City Produce Exchange	116	Medbury v. Watson	252
Mack v. Bragg	212	Meguire v. Corwine	107
Mackay v. Dick	164	Memphis v. Brown	296
McKenzie v. Harrison	282	Mentz v. Newwitter	208
M'Kinnell v. Robinson	126	Merchants' Fire Ins. Co. v. Grant	267
McKown v. Furgason	255	Merriam v. Cunningham	233
Maclay v. Harvey	93	Merrick v. Giddings	75
McMillan v. Fox	178	Merrill v. Green	222
v. Michigan &c. R. R. Co.	50	v. Packer	105
McNamara v. Gargett	105	v. Peaslee	119
McPherson v. Cox	201	v. Wilson	265
McQuade v. Rosecrans	133	Merriman v. Moore	221
McRaven v. Crisler	154	Merritt v. Clason	209
Mactier v. Frith	94	Mersey Co. v. Naylor	157, 166, 186, 237
Madan v. Sherard	49	Methven v. Staten Island Light Co.	275
Maddison v. Alderson	213	Meyers v. Schemp	201
Maddox v. Rowe	206	Middleton v. Hoge	266
Madison County v. Bartlett	305	Miles v. New Zealand Alford Estate Co.	68
Maggs v. Ames	195	Miller v. Ammon	102
Maguire v. Sinock	108	v. Craig	236
Maiden v. Webster	140	v. Long	195
Maine Mut. Marine Ins. Co. v. Hodgkins	36	v. Minor Lumber Co.	255
Makin v. Watkinson	191	v. Rutledge	236
Mallalieu v. Hodgson	103	Mills v. Dunham	174
Mallan v. May	135	v. Wyman	84
Mandeville v. Welch	273	Millward v. Littlewood	125
Mangles v. Dixon	275	Ming v. Woolfolk	253
Manter v. Churchill	69	Minneapolis, &c. R. R. Co. v. Columbus Rolling Mill	92, 95
Marcy v. Marcy	204, 212	Minneapolis Gaslight Co. v. Kerr-Murray Mfg. Co.	182
Markham v. Jandon	117	Minnesota Oil Co. v. Collier, &c. Co.	98, 95
Marsden v. Moore	159	Mitchell v. Ryan	41
Marsh v. Rainsford	83	Mixer v. Howarth	205
Marston v. Bigelow	217	Moggridge v. Jones	160, 292
Martin v. McCormick	187	Mohr v. Niesen	116, 117, 127
v. Richardson	131	Molton v. Camroux	235, 263
v. Thomas	293	Mony v. Leake	132
v. Tradesmen's Ins. Co.	293	Moore v. Bevier	138
Martinsburg & P. R. R. Co. v. March	166, 167	v. Campbell	52, 284
Mason v. Eldred	138	v. Rogers	138
v. U. S.	256	Moran v. Prather	169, 170
Materne v. Horwitz	104	More v. Bennett	121, 122
Mather v. Butler County v. Scoles	304, 200, 201	v. Bonnet	136
Matthews v. Baxter	234	Morehouse v. Second Nat. Bank	296
Matthiessen Co. v. McMahon	235		
Mattock v. Kinglake	154		
Maule v. Bucknell	197		
May v. Williams	195		

## TABLE OF CASES.

XXXV

	Page		Page
Morse v. Wheeler	267	Noyes v. Humphreys	197
v. Woodworth	256, 257, 258, 259	Nunez v. Dautel	183
Morton v. Dean	208, 210		
v. Lamb	159	OAKDALE Mfg. Co. v. Darst	121
Moses v. Lawrence County Bank	209	Odessa Tramways Co. v. Mendel	132
Moss, <i>Ex parte</i>	273	O'Donnell v. Leeman	208, 210
Moulton v. Kershaw	46	Oelricks v. Ford	50
Muir v. Schenck	275	Offord v. Davies	87, 96
Mulholland v. Bartlett	68	Ohio v. Board of Education	132
Munroe v. Perkins	70, 71	Old Colony R. R. Co. v. Evans	210
Musick v. Dodson	84	Oliphant v. Markham	256
Myrick v. Dame	138	Oliver v. Hunting	51, 170, 207
		Ollive v. Booker	186
		Omaha & R. V. Ry. Co. v. Brady	111
NASH v. Armstrong	285	O'Neill v. Clark	225
National Bank v. Grand Lodge	227	Oregon Pac. R. Co. v. Forrest	256
National Furnace Co. v. Keystone Mfg. Co.	61	Oregon Steam Navigation Co. v. Winsor	120, 135
National Masonic Ass'n v. Burr	114	Ormes v. Beadel	255
Neagle v. Kelly	196	O'Rourke v. Burke	174
Nebblett v. Macfarland	264	Osborn v. Martha's Vineyard R. R. Co.	138
Neff v. Horner	292	Otis v. Cullum	290
Nelson v. Boynton	197		
v. Rogers	220		
Nester v. Continental Brewing Co.	121	PACIFIC Guano Co. v. Mullen	133
New York Guaranty Co. v. Memphis Water Co.	274	Packet Co. v. Sickles	202
N. Y. Life Ins. Co. v. Aitkin	226	Page v. Higgins	239
v. Statham	150, 185	v. Morgan	210
Newell v. Radford	208	v. Newman	305
Newington v. Levy	282	v. Norfolk	52
Newman v. Newman	185	v. Parker	252
Newton v. Tolles	187	Paget v. Marshall	240
Nichols v. Mudgett	107	Paine v. Brown	155
v. Scranton Steel Co.	287	Palfrey v. Portland, &c. Ry. Co.	68
Nickelson v. Wilson	112	Pangborn v. Westlake	102
Noble v. Ward	284	Parish v. U. S.	50
Nolan v. Whitney	162, 167, 278	Parker v. Enslow	68
		v. Russell	304
Noland v. Bull	183	v. S. E. Ry. Co.	49
Noonan v. Bradley	172	Parmentier v. Pater	257
Nordenfelt v. Maxim-Nordenfelt Co.	121	Parsons v. Loucks	205
Norrington v. Wright	157, 166, 186, 286	Partridge v. Hood	112
		v. Messer	103
Northrup v. Northrup	153, 154	Patch v. Collins	280
Northwestern Ins. Co. v. Blankenship	235	Patrick v. Bowman	96
		Payne v. Brecon	132

	Page		Page
Pearce v. Brooks	126	Potts v. Whitehead	93
Pecke v. Redman	59	Poulton v. Lattimore	161
Peirce v. Corf	209	Pratt v. Philbrook	268
Peltz v. Eichele	135	v. Trustees	98
Pemberton Bldg. & Loan		Presbury v. Fisher	135
Ass'n v. Adams	233	Presbyterian Church v. Cooper	78, 79, 218
Penniman v. Hartshorn	209	Prewett v. Coopwood	129
Pennsylvania Co. v. Lombardo	111	Price v. Easton	216
Pennsylvania R. R. Co. v. Shay	36	Pritchard v. Norton	173
People v. Globe Mut. Life Ins. Co.	177, 181	Proctor v. Sears	268
v. Harrison	138	Prosser v. Edmonds	111
v. Milk Exchange	122	Pruitt v. Pruitt	223, 226
Perkins v. Hadsell	210	Pueblo R. R. Co. v. Taylor	183
v. Cummings	183	Putnam v. Grace	92
v. Lockwood	77	v. Woodbury	74
Peters v. Westborough	202, 203	RADICH v. Hutchins	256
Peugh v. Porter	274	Raffles v. Wichelhaus	90
Philadelphia, W. & B. R. R. v. Howard	153, 154, 173	Railroad Co. v. Mfg. Co. v. Trimble	50
Phillips v. Phillips	115	Ramsgate Hotel Co. v. Montefiore	93
v. South Park Commissioners	111	Randall v. Randall	115
Phillipotts v. Evans	304	Rann v. Hughes	17, 55, 83
Philpott v. Wallet	200	Rawson v. Clark	179
Pickering v. Ilfracombe Ry. Co.	132, 134	v. Johnson	158
Pickersgill v. Lahens	189	Rayburn v. Comstock	289
Pierce v. Indreth	41	Raynay v. Alexander	158
v. Paine	204	Read v. Nash	195
Pigot's Case	133, 134, 135, 136	Redding v. Lamb	291
Pillans v. Van Mierop	17, 55	Redgrave v. Hurd	254
Pinnel's Case	66	Reece v. Kyle	110
Pittsburg, Ft. W. & C. R. R. Co. v. Hazen	183	Reed v. Ins. Co. v. Washington Ins. Co.	113
Pixley v. Boynton	116, 125	Reese v. United States	293
Planters' Bank v. Union Bank	131	Reif v. Page	64
Platner v. Patchin	277	Remick v. Sandford	210
Plummer v. People	258	Remington v. Palmer	212
Pool v. Boston	64	Reynell v. Sprye	129
Poole v. Hill	164	Reynolds v. Bridge	190
Pope v. Allis	161	v. Robinson	52
Porter v. Day	117	Rhodes, <i>In re</i>	236
v. Richmond	219	Rice v. D'Arville	300, 307
Portner v. Kirschner	112	v. Goddard	291
Postlethwaite v. Freeland	183	Richards v. Heather	138
Potomac Steamboat Co. v. Upper Potomac Stbt. Co.	50	Richardson v. Crandall	124
Potter v. Monmouth Fire Ins. Co.	260	v. Rowntree	49
		Riddlesbarger v. Hartford Ins. Co.	151
		Ridgway v. Wharton	51, 52, 207
		Rigdon v. Walcott	265

## TABLE OF CASES.

xxxvii

	Page		Page
Riggs v. Amer. Tract Society	285	Saunderson v. Marr	231
Ripley v. M'Clure	165, 288	Savery v. King	264
Robb v. Vos	269	Sawyer v. Lufkin	236
Robbins v. Eaton	266	Scava v. True	236
Roberts v. Brett	159	Schley v. Fryer	219
v. Cobb	78	Schmaling v. Thomlinson	215
Robertson v. French	174	Schmueckle v. Waters	105
v. Robinson	106	Schneider v. Norris	209
Robinson v. Davison	181	Schnell v. Nell	60
v. Glass	36, 37	Schomp v. Schenk	110
v. Gould	258	School District v. Dauchy	179
v. Ommannney	120	School Trustees v. Bennett	179
v. U. S.	170, 171	Schuler v. Myton	78
Robson v. Drummond	272	Schultz v. Catlin	258
Rochester Lantern Co. v.		Schuylkill County v. Copley	35
Stiles & Parker Press Co.	273	Schwartz v. Saunders	179
Rockford, etc. R. R. Co. v.		Scotson v. Pegg	74
Shumiels	35	Scott v. Avery	114, 151
Roebbing's Sons v. Lock		v. Brown	104
Stitch Fence Co.	288, 304	v. Bryan	195
Roesner v. Hermann	123	v. Littledale	245
Roffey v. Greenwell	141	v. Perrin	264
Rogers v. Rogers	278	v. Shreeve	275
Rondeau v. Wyatt	204	Sears v. Eastern R. R. Co.	47, 98
Roscorla v. Thomas	83	Seaver v. Phelps	233, 235
Ross v. Drinkard	251	Secombe v. Steele	185
v. Moss	69	Secor v. Clark	256
Roszell v. Roszell	240	Seeger v. Duthie	153
Rotherman Alum Co., <i>In re</i>	216	Seeright v. Fletcher	36
Rousillon v. Rousillon	121	Seever v. Gabel	180
Royal Ins. Co. v. Beatty	28	Selden v. Myers	36
Ruff v. Jarrett	253	Serviss v. McDonnell	221
Rugg v. Moore	287	Sessions v. Johnson	138
Rupley v. Daggett	91	Seward v. Huntington	220
Ryan v. U. S.	207	v. Mitchell	67, 118
		Shadwell v. Shadwell	74
		Sharp v. Taylor	131
		Sharpless v. Gummey	253
St. ALBANS v. Shore	167	Sheehy v. Adarene	204
St. Louis & P. R. R. Co. v.		v. Mandeville	138
Kerr	164	Sheeren v. Moses	156, 158
St. Louis, V. & T. H. R. Co.		Sheldon v. Davidson	250
v. Terre Haute & I. R. Co.	34, 129	Shelly v. Mikkelson	155, 160
St. Mark's Church v. Teed	69	Shelly's Appeal	123
Salmon Falls Mfg. Co. v.		Shelton v. Ellis	246
Goddard	207, 209	Shepard v. Carpenter	52
Sample v. Bridgforth	188	v. Rhodes	60, 81, 82
Samuels v. Oliver	121	Sherman v. Kitsmiller	31
Sanders v. Classon	197	Sherwood v. Walker	188
v. Pottlitzer Bros. Fruit		Shipley v. Reasoner	105
Co.	52	Shippey v. Henderson	81
Sanford v. First Nat. Bank	189	Short v. Stone	164, 288, 303
Sanger v. Dun	86	Shrimpton v. Netzorg	37

	Page		Page
Shuey v. U. S.	98	Spring Co. v. Knowlton	130
Shulter's Case	35	Stacy v. Ross	35
Shute v. Dorr	203	State v. Binder	268
Sibley v. Felton	52	v. Clarke	231
Sibree v. Tripp	66	v. Davis	219
Silliman v. U. S.	256	v. Dimick	266
Simmons Creek Coal Co. v.		Stavers v. Curling	153
Doran	239	Stearns v. Hall	278
Simon's v. Great Western		Steeds v. Steeds	140, 285
Ry. Co.	85, 49	Steele v. Buck	181
Sims v. Everhardt	233	Steels v. Leonard	179
v. Ferrill	251	Stenton v. Jerome	256
Simson v. Brown	222	Stephenson v. Elliott	219
Singerly v. Thayer	184	Stevenson v. Crapnell	41
Sioux Nat. Bank v. Norfolk		Stiles v. Probst	293
State Bank	253	Stokes v. Mackay	165
Slade v. Mutrie	282	Stone v. Wilbern	236
Slade's Case	24	Stover v. Wood	252
Slaughter v. Gerson	253	Stowers v. Hollis	232
Slingsby's Case	137	Strickland v. Turner	187, 224
Small v. Chicago, &c. R. R.		Strong v. Sheffield	69
Co.	111	Studwell v. Shapter	233
Smith v. Burnham	201	Suffern v. Butler	36
v. Hughes	247, 248	Summers v. Hibbard	179
v. Kelley	267	Sutherland v. Reeve	275
v. Mace	293	Sutton v. Grey	199
v. Mayo	267	Swain v. Seamens	213, 278
v. Morse	61	Sweeney v. U. S.	166
v. Smith	250	Sweigart v. Berk	137
v. West	213	Sykes v. Chadwick	55
v. Whildin	64	v. St. Cloud	163
Smith's Appeal	135	Synge v. Synge	288
Snell v. Ins. Co.	241		
Snow v. Wheeler	123	TALBOTT v. Stemmons	58
Snyder v. Willey	133	Tappan v. Albany Brewing	
Somerby v. Buntin	205	Co.	104
Soper v. Arnold	291	Tarrabochia v. Hickie	186
Sornborger v. Sanford	256	Tayloe v. Merchants' Fire	
Souch v. Strawbridge	212	Ins. Co.	94, 96
Southern Development Co.		Taylor v. Blanchard	120, 121
v. Silva	250, 252	v. Bowers	130
Soutier v. Kellerman	170, 171	v. Brewer	31
Spain v. Hamilton	274, 275	v. Caldwell	178
Spalding v. Ewing	108	v. Hilary	284
v. Rosa	181	v. Laird	44
Speake v. United States	293	v. Renn	162, 163
Spear v. Griffith	85	v. Smith	210, 211
Speed v. Hollingsworth	254	Temple v. Johnson	213
Spence v. Healey	285	Thacker v. Hardy	116, 128
Spencer v. Cone	205	Thackrah v. Haas	264
v. Harding	47	Thalhimer v. Brinkerhoff	110
Speyer v. Desjardins	201	Thayer v. Burchard	62
Spiller v. Westlake	160, 292		

## TABLE OF CASES.

xxxix

	Page		Page
Thayer v. Daniels	275	UECKER v. Koehn	266
v. Rock	201	U. S. v. Behan	805
The Teutonia	177	v. Bostwick	66, 171
Theiss v. Weiss	84	v. Bradley	134
Thomas v. Cook	195	v. Buchanan	170
v. Watt	269	v. Buford	275
Thompson v. Charnock	113	v. Grossmayer	106
v. Gillespy	148	v. Price	138, 139
v. Howard	269	v. Thomas	181
v. Ins. Co.	52	Ungley v. Ungley	213
v. Nigley	257	Union Bank v. Geary	68
v. Reynolds	110	v. Louisville, &c. Ry.	102
v. Riggs	170	Union Life Ins. Co. v. Han-	
Thorn v. City Rice Mills	174	ford	228
v. Pinkham	112	Union Ry. Storage Co. v. Mc-	
Thornhill v. Neats	288	Dermott	222
Thornton v. Illingworth	265	Upton v. Tribilcock	251
v. Wynn	292	Urquhart v. McPherson	264
Thoroughgood's Case	35		
Thorp v. Bateman	45		
Thurnell v. Balbirnie	166	VALENTINE v. Foster	82, 85
Tidey v. Mollett	148	v. Stewart	112
Tilley v. Thomas	186	Van Buren v. Digges	190
Tillock v. Webb	128	Van Clief v. Van Vechten	162
Tinn v. Hoffman	92	Vandenbergh v. Sponer	207
Tisdale v. Harris	205	Vanderbilt v. Schreyer	70, 71
Titus v. Rochester German		Van Houten v. Morse	249
Ins. Co.	251	Van Ness v. Washington	50
Tobey v. County of Bristol	113	Van Valkenburgh v. Rouk	36
Todd v. Weber	218	Van Weel v. Winston	50
Tompkins v. Hill	66, 296	Varnum v. Highgate	187
Tool Co. v. Norris	108	Vassar v. Camp	95
Topliff v. Topliff	172	Vereycken v. Vanderbrooks	65
Torrence v. Shedd	111	Very v. Levy	285
Townsend v. Long	196	Vince, <i>In re</i>	31
v. Rackham	218	Viney v. Bignold	114, 151
v. Vanderwecker	213	Vrooman v. Turner	221
Traders' Nat. Bk. v. Parker	69	Vought v. Williams	167
Trainer v. Trumbull	232	Vyse v. Wakefield	174, 191
Trevor v. Wood	95		
Trickey v. Lane	292		
Trimble v. Hill	118	WABASH Western Ry. v.	
Trist v. Child	108	Brow	283
Trounstone v. Sellers	95	Wachmuth v. Martini	253
Trower v. Elder	190	Wadsworth v. Sharpsteen	237
Trueblood v. Trueblood	231	v. Warren	52
Trustees v. Anderson	225	Wain v. Warlters	208
v. Haskell	78	Walker v. Cronin	215
Turk v. Ridge	222	v. Johnson	202
Tuttle v. Tuttle	68	v. Nussey	211
Tweddle v. Atkinson	216, 217	v. Tucker	178
Tyler v. Carlisle	126	Wallace v. Berdell	41
		v. Rappleye	5c

	Page		Page
Wallace v. Townsend	98	White v. Barber	116
Wallingford v. Mutual So-		v. Bluett	32
cietv	190	v. Corlies	92
Wallis v. Littell	52	v. Cuyler	294
Wall's Appeal	32	v. Equitable Union	119
Walmesley v. Cooper	283	v. Middlesex R. R. Co.	113
Walter A. Wood, &c. Co. v.		v. Tyndall	139
Smith	184	v. Vermont & Mass. R.	
Walton v. United States	294	R. Co.	271
Wamell v. Reed	126	Whitney v. Hale	42
Ware v. Allen	52	Whittaker v. Southwest Va.	
Ward v. Lloyd	112	Improvement Co.	257
Warlow v. Harrison	46	Whittier v. Dana	284
Warner v. Crouch	59	Widoe v. Webb	133
Warnock v. Davis	116	Wieland v. Kobick	233
Warren v. Batchelder	223	Wilbur v. Stoepel	106
v. First Nat. Bank	273	v. Warren	53
v. Warren	213	Wilcox v. Arnold	84
Washburn v. Fletcher	95	v. Howland	257
v. Interstate Investment		Wildes v. Savage	87
Co.	222	Wiley v. Athol	163
Washington Cent. Imp. Co.		Wilkinson v. Byers	66
v. Newlands	253	v. Johnson	292
Waterman v. Banks	93, 185	Wilks v. Smith	154
Watson v. Doyle	237	Willard v. Wood	225, 227,
Watts v. British & Amer.			228
Mtg. Co.	269	Willemin v. Batteson	113
Waugh v. Morris	124	William Butcher Steel Works	
Way v. Sperry	81	v. Atkinson	212
Webb v. Stephenson	288	Williams v. Bayley	112, 129
Webster v. Munger	125	v. Carwardine	80, 113
Wegg Frosser v. Evans	139	v. Leper	198
Welch v. Mandeville	274	v. Moor	81
v. Marvin	200	v. Spurr	248
v. Sackett	42	Wilmington Transportation	
Weller's Appeal	86	Co. v. O'Neil	180
Weller v. Goble	222	Wilson v. Bevans	196
Wells v. Calnan	167	v. Carpenter	254
West v. Camden	105	v. Powers	65
Western Union Tel. Co. v.		v. Wilson	115
B. & S. Ry. Co.	135	Wilson S. M. Co. v. Curry	257
v. Chicago & P. R. R. Co.	207	Winchester v. Nutter	118
Wharton v. Stoutenburgh	52	Windhill Local Board v. Vint	112
v. Winch	287	Windmuller v. Pope	165
Wheat v. Rice	221	Winn v. Bull	52
Wheeler v. Frankenthal	211	Withers v. Greene	292
v. New Brunswick, &c.		v. Reynolds	157, 287
R. R. Co.	174	Wolf v. Marsh	164
v. Sage	131	Wolford v. Powers	57
v. Stewart	216	Wood v. Boynton	188, 244
Whelpdale's Case	138	v. Moriarty	224
Whinup v. Hughes	181	Woodberry v. Warner	164, 288
Whipple v. Parker	204	Woodman v. Innes	108

# TABLE OF CASES.

xli.

	Page		Page
Woodstock Iron Co. v. Richmond & Danville Extension Co.	105, 108, 109	YERRINGTON v. Greene	181
Worden v. Sharp	212	York v. Hinkle	257
Worsley v. Wood	166	Young v. Godbe	305
Wright v. Briggs	219	v. Power	282
v. Dannah	210	v. Stevens	235
v. Ryder	120, 121	v. Young	282
Wyche v. Greene	240	Youngs v. Trustees	225
Wyley v. Bull	45	Yundt v. Roberts	133
Wynne v. Whisenant	112		
		ZALESKI v. Clark	184
		Zeigler v. Mize	111
		Zuck v. McClure	288
XENOS v. Wickham	8, 41, 42		





ELEMENTS  
OF THE  
LAW OF CONTRACTS.

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INTRODUCTION.

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PART I.

THE NATURE OF CONTRACTUAL OBLIGATION.

THE word "contract" might well be supposed to have attained by this time a definite legal meaning. An examination of the various ways in which the term is used, however, shows clearly that the different meanings given to the term in different connections render any one definition entirely inadequate. For example, contracts are often divided into contracts of record, such as judgments and recognizances; specialties, or contracts under seal; and simple or parol contracts. The only feature in common possessed by these three classes of "contracts" is that an action *ex contractu* would lie at common law to enforce any of them.

Again, contracts have been divided into executed and executory contracts. An executed contract represents a completed transaction between two parties. Thus, if A. exchanges horses with B., the transaction is spoken of as an executed contract. In an executory contract, on the other hand, something remains to be done by one

## 2      ELEMENTS OF THE LAW OF CONTRACTS.

or both parties. Between executed and executory contracts, therefore, there is the most fundamental difference. In an "executory contract" there exists some obligation on some one to do something; while in an "executed contract" there is no obligation whatever existing. The transaction is completed.

Contracts again are divided by Blackstone into express and implied contracts. "*Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making. . . . *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform; . . . and upon this presumption makes him answerable to such persons as suffer by his non-performance."<sup>1</sup> Among these implied contracts Blackstone includes penal statutes, whereby a forfeiture is inflicted for transgressing the provisions therein contained. "The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires."<sup>2</sup> Other implied contracts "arise from the general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires." The idea that every man has contracted to do his duty is a striking instance of those fictions in which the older law abounds; but on examination of the different obligations which Blackstone treats as contracts, we find that their only common feature is that they are all enforceable by actions *ex contractu*.

Again, it has been said that "Contract results from a combination of the two ideas of agreement and obliga-

<sup>1</sup> Blackstone's Commentaries, II. 443; III. 158.

<sup>2</sup> *Ibid.*, III. 159.

tion. . . . Contract is that form of agreement which directly contemplates and creates an obligation."<sup>1</sup> But when we inquire whether it is the agreement that constitutes the contract, or the obligation resulting from the contract, we find the word "contract" variously used. Sometimes it is used to denote the fact of agreement, sometimes the nature of the agreement, sometimes, in the case of a written undertaking, the written instrument containing the agreement, and sometimes the obligation resulting from the agreement. Then, too, we hear constantly of "void contracts" and "illegal contracts," which create no obligation whatever. Moreover, the objections to Sir William Anson's definition of contract are clearly stated by himself. "This statement," he adds, "must be limited in its application to a scientific system of jurisprudence in which rights have been analyzed and classified. The conception of obligation, as we understand it, was probably not clearly present to the minds of the judges who first enforced promises to do and forbear; and we may be quite sure that they did not rest their decisions, as to the validity of such promises, upon agreement or the union of wills." The statement that "the analysis is none the less accurate because it has not always been made or understood" may justly be questioned. A "scientific system of jurisprudence" seems to demand rather an analysis and classification of our own legal ideas and institutions than the attempt to superimpose upon our own law the analysis, however scientific, of another and alien system. Whatever may be the relation of agreement to the Roman law of contract, nothing is clearer than that agreement is not the fundamental idea underlying contractual obligation in the common law. The contractual obligations which the common law recognized were

<sup>1</sup> Anson on Contracts (8th ed.), 1, 2.

#### 4 ELEMENTS OF THE LAW OF CONTRACTS.

enforced, and are still enforced, not because those obligations are the result of agreement, but because certain forms of procedure afforded remedies for certain wrongs. It is therefore only by the study of the history of English procedure that we can understand the principles of the English law of contract. The historical development of our modern theory of contract will be explained in the next chapter.

The meaning of the word "contract," as used in legislative enactments, varies with the connection in which it is used. For example, the United States Constitution prohibits any State from passing any law "impairing the obligation of contracts." The Supreme Court has held that the term "contracts," as used in this clause of the Constitution, includes the charter of a corporation,<sup>1</sup> which would not be regarded as a contract at common law, but does not include a judgment obtained against a municipality for damages caused by a mob,<sup>2</sup> although such judgment is called a "contract of record."

If then we seek to build up a definition of the term "contract," which shall include all things that have been called contracts, and shall exclude all things which have been held not to be contracts, the task is evidently impossible. Nor is the reason for this impossibility far to seek. Terms which are used chiefly or exclusively by men of a given trade or profession soon acquire a definite technical meaning. Such terms, for example, as "seisin" and "conversion" can be clearly defined. Terms, however, which are in common use, and which by reason of their common use are also of frequent occurrence in the technical terminology of the law, or of any other science, are very apt to be

<sup>1</sup> Dartmouth College v. Woodward, 4 Wheat. 517.

<sup>2</sup> Louisiana v. New Orleans, 109 U. S. 285; 3 S. Ct. 211.

used in the loose way in which the word "contract" has been used.

Any definition of contract, therefore, must be either arbitrary or inexact. But there are certain well marked obligations which may be called contractual, which are capable of definition, and seem properly to call for distinct treatment. With such obligations this book deals. In order to define these obligations we must first look for a moment at the general field of jurisprudence.

The rights which courts of justice protect, and the obligations which they enforce, are of many kinds. For scientific purposes these rights and obligations must be properly classified, just as flowers must be classified by the botanist, and rocks by the geologist. This classification is rendered especially difficult in our law by the fact that the law has crystallized around forms of procedure. The history of English law shows a slow development from the superstitions of the dark ages, through the technicalities of later times, of those principles of justice which alone can give to law the approval of reason. In former days the procedure by which rights were enforced was regarded by the courts as of greater importance than the rights themselves. Consequently the classification of rights and obligations was determined by the remedies given for their enforcement; which is about as satisfactory a method of classification to the student of jurisprudence as the classification of flowers or rocks by their color would be to the botanist or geologist. Obligations enforced in the same manner were given the same name. Every obligation enforceable by an action *ex contractu* was termed a contract, regardless of the real character of that obligation; and as actions *ex contractu* came to be used in a great variety of cases, there came to be so many kinds of "contracts," that to define a contract has become, as we have seen, an

impossibility. Nevertheless, in the case of many "contracts," using the word in its broadest sense, we find existing an obligation with certain definite characteristics which can easily be recognized. This obligation we shall venture to call "contractual." Of the formation of this contractual obligation, of its construction, its assignment, its extinction, and its enforcement, this book is to treat.

How then are we to distinguish contractual obligation from other legal obligations? In the first place, looking at the endless variety of obligations which the courts enforce, we notice that some obligations are imposed upon a person without his consent, and without regard to any act of his own, while other obligations are the result of a voluntary act on the part of the person on whom they are imposed. The former may be termed *irrecusable*, the latter *recusable*<sup>1</sup> obligations. A clear example of irrecusable obligation is the obligation imposed on every man not to strike another without some lawful excuse. Here the obligation is entirely independent of any act on the part of the person bound by it. In the case of recusable obligations, on the other hand, some act on the part of the person bound is a condition precedent to the genesis of the obligation.

Recusable obligations are either definite or indefinite in their character, according as the extent of the obligation is or is not determined by the act of the party on whom the obligation is imposed. Indefinite recusable obligations may result from the fact that the party bound has undertaken to do something. The undertaking may be general, as where one engages in a public vocation, or it may be particular, being simply the undertaking of a specific act or trust. Thus the obliga-

<sup>1</sup> These terms have been suggested by my colleague, Professor Wigmore, in 8 *Harvard Law Rev.* 200.

## THE NATURE OF CONTRACTUAL OBLIGATION. 7

tion of an innkeeper to receive guests, and the obligation of a common carrier to receive goods for transportation, are general indefinite recusable obligations. Such obligations are recusable, for no one is bound to be an innkeeper or common carrier; they are indefinite, because they are not determined by the act of the party on whom they are imposed; and they are general, because they extend to the public. The undertaking of a gratuitous bailee, on the other hand, imposes on him a particular indefinite recusable obligation. This obligation is recusable, because it is voluntarily assumed; it is indefinite, because its extent is not determined by the act of the party on whom the obligation is imposed, but by certain rules of law in regard to "due care"; and it is particular, because it extends only to the owner of the property bailed.<sup>1</sup> The obligation of a trustee is also a particular indefinite recusable obligation. The obligation arises from a voluntary act, the acceptance of a trust; it is determined by the general principles of equity; and it extends only to the *cestui que trust*.

In the case of definite recusable obligations, the extent of the obligation is fixed by the act giving rise to the obligation. Definite recusable obligations are of two kinds, which may be termed unifactoral and bifactoral. A unifactoral obligation is created by the act of the party bound. A bifactoral obligation requires two acts, one by the party on whom the obligation is imposed, the other by the party to whom the obligation extends.

<sup>1</sup> Professor Beale shows clearly the distinction between contracts and gratuitous undertakings in 5 Harvard Law Rev. 222. He maintains, nevertheless, that the obligation of a carrier or innkeeper to the public is such that a breach of it sounds only in tort. A tort obligation, however, is irrecusable, as pointed out by Professor Wigmore in 8 Harvard Law Rev. 200; while the carrier's or innkeeper's obligation is recusable.



The existence of unifactoral obligations in the common law cannot be denied,<sup>1</sup> although some of the jurists, it seems, would rather be rid of such obligations than modify their theories to meet the decisions of the courts. Thus, if a deed contains an acknowledgment of obligation by the maker, its delivery gives rise to a unifactoral obligation.<sup>2</sup> In some States the common law rule has been altered, however, and acceptance of the deed has been held essential to its validity, the courts in those States treating the obligation created by a deed as necessarily bifactoral. A unifactoral definite recusable obligation may be termed contractual, and is so treated by the courts, if not by the jurists, most of whom maintain that contractual obligation must be bifactoral.

Bifactoral definite recusable obligations are of two kinds. The nature and characteristics of the act of the obligor, which may be called the primary act, resemble each other in both cases; but the character of the secondary act, or the act of the obligee, differs in these two kinds of obligations. In one case, the secondary act may be of an indefinite character; in the other case, the secondary act is fixed by the primary act. The first kind of obligation has a well known example in equity under the name of equitable estoppel, and seems to have obtained general recognition in the common law courts. To constitute an obligation of the first class, all that is essential is that the secondary act should be done in reasonable reliance on the primary act. How far such

<sup>1</sup> *Xenos v. Wickham*, L. R. 2 H. L. 296. Professor Holland (Jurisprudence, p. 244) hopes "that this case may some day be explained away"; and quotes the German jurists as stigmatizing the case as "ein juristisches Monstrum." Anson characterizes the existence of the unifactoral obligation as an anomaly. Contracts (8th ed.), p. 32.

<sup>2</sup> *Xenos v. Wickham*, *supra*.

obligations are actually enforced by the courts is hard to state. In equity, the doctrine has long obtained that a man who makes a representation in reliance upon which he induces another to act will be estopped to deny the truth of that representation to the prejudice of the party who has so acted. The representation which will work an estoppel, however, must be a representation of existing fact. In the common law courts the action on the case for deceit at the time when that action would lie for breach of a parol promise shows a recognition of a bifactoral obligation of similar character. Indeed, the present action for deceit is based on a bifactoral obligation, which, though recusable, is indefinite in character. For in deceit the extent of the obligation is not determined by the primary act, namely, the false representation by the defendant, but is indefinite in character, extending to all the damage which is the natural consequence of the plaintiff's acting in reliance on such false representation. The action for deceit for breach of a parol promise, however, has long since passed away. Whether there is a broad common law principle that a false representation will give rise to an obligation if acted upon seems very doubtful, although there are specific cases which can best be supported by reference to such a principle. Certain it is, that both at law and in equity a bifactoral definite recusable obligation can be created only in two cases; first, where the primary act definitely fixes the character of the secondary act; secondly, where the primary act is a representation of existing fact, in which case the secondary act may be indefinite in character, provided it is done in reasonable reliance on the primary act. Where the primary act definitely fixes the character of the secondary act we have a bifactoral obligation which may be termed, as it is termed by the courts, contractual. T

## ELEMENTS OF THE LAW OF CONTRACTS.

primary act, as will be seen later, is the promise, the secondary act the consideration.

We have chosen, then, to apply the adjective "contractual" to two kinds of obligation, one unifactoral, the other bifactoral. What are the common features of these two kinds of contractual obligation? The answer is simple. In both the obligation is recusable, resulting from the voluntary act of the party bound; and in both the obligation is determined by the act of the party on whom it is imposed. In the unifactoral contract the act of the obligor creates and defines the obligation. In the bifactoral contract the act of the obligor does not of itself create the obligation, but it fixes the terms on which the other party may, by performing the specified act, to wit, the consideration, impose such obligation on the obligor. The two essential features of contractual obligation, therefore, are, first, that it is the result of a voluntary act on the part of the obligor; and secondly, that this voluntary act determines the extent of the obligation and all conditions necessary to its existence.

We may here sum up the various resemblances and differences between contractual and other obligations. Contract differs from tort and quasi-contract in that contractual obligation is recusable, while tort obligation and quasi-contractual obligation are irrecusable. Contractual obligation resembles the obligation of a bailee or trustee in being both recusable and particular; the difference is that the former is definite, the latter indefinite. The obligation of a simple contract resembles the obligation to answer for damages caused by deceit, in this, that both obligations are recusable and bifactoral, and that in both the secondary act must be done in reliance on the primary act; simple contract obligation differs from deceit obligation in this, that the former is definite, the latter indefinite; that in the former the

primary act determines the secondary act, while in the latter the secondary act is indeterminate; and also, though this distinction is perhaps less universally accepted, that in the former the intention of the party is immaterial, while in the latter intention to deceive is an essential element. Finally, simple contract obligation resembles equitable estoppel in this, that both are bifactoral definite recusable obligations; it differs from estoppel in this, that in contract the primary act determines the secondary act, while in estoppel the secondary act is indeterminate.

Such being the nature of contractual obligation, what shall we fix upon as a "contract"? In the case of a unifactoral contract the answer is easy. The contract is the act which creates the obligation. In the case of bifactoral contracts it is more difficult to determine what constitutes the contract. The answer seems to depend upon whether the bifactoral contract is unilateral or bilateral. A contract is called bilateral if it imposes obligation on both parties; unilateral, if only one is bound. A unifactoral contract is necessarily unilateral, but a bifactoral contract may be either unilateral or bilateral. If A. promises B. to pay him \$1 for a day's work, and B. performs the work, A.'s promise to pay B. becomes a unilateral contract. But if A. promises to pay B. \$1,000 if B. will agree to work for A. for a year, and B. accepts A.'s offer, we have a bilateral contract by which A. is bound to pay B. \$1,000, and B. is bound to work for A. for a year. It is only where two parties incur mutual obligations at the same time, and by acts of the same legal character, that a contract is bilateral. Two promises made in different forms, legally speaking, cannot, therefore, constitute part of the same contract, although such promises are mutual, and are given in consideration of each other. Thus, a promise under sec'

## 12    ELEMENTS OF THE LAW OF CONTRACTS.

cannot form part of the same contract with a promise not under seal; nor can a promissory note form part of any other contract. These propositions, although simple enough, and clear enough in principle,<sup>1</sup> have often been overlooked by the courts.<sup>2</sup> An entire transaction has often been treated as one contract, without regard to the inherent impossibility of a parol promise forming part of the same contract with a specialty.

A promise not under seal requires a consideration to make it binding. Is the consideration part of the contract or not? If the contract is unilateral, the consideration is clearly not part of the contract, but simply a condition precedent to its existence. If the contract is bilateral, it is composed of the mutual promises only, even though there be other considerations on each side, for such considerations are only conditions precedent to the existence of the contract, and cannot form part of it. In short, if the contract is unilateral, the "contract" is the primary act which gives rise to the obligation, and the secondary act (if there is one) is not part of the contract; if the contract is bilateral, the contract is composed only of the primary acts giving rise to the obligation on each side.

It has been customary to treat all contracts as if the idea of promise or agreement were common to all. As a matter of fact, however, contracts are of two distinct kinds, formal and simple. The nature of these two kinds of contracts is essentially different. The formal contract is a contract because the party executing it has done some formal act which establishes his legal obligation to the other party. The simple contract, on the other hand, is composed of a promise or promises. The attempt has been made to treat formal contracts as

<sup>1</sup> Langdell, Summary of Contracts, § 117.

<sup>2</sup> As in *Hunt v. Livermore*, 5 Pick. 395; *Langdell's Cases*, 757.

if they were necessarily promises or agreements; but this is historically incorrect. Formal contracts were originally regarded as grants, rather than promises, and the early ideas of such contracts still have an important influence on the law. If A. gives B. a deed acknowledging that he is indebted to B. in the sum of \$100, A. has made a contract whereby he has bound himself to pay B. \$100. It may be said that such a deed implies a promise on A.'s part to pay B. \$100. Historically, however, as just stated, such a deed has been regarded rather as a grant than as a promise. Moreover, it is clear that implying a promise from such a deed is a very different thing from implying a promise from a man's conduct in accepting the services of another. The truth is, that while such a deed is a contract, and gives rise to contractual obligation, that obligation is the result, not of a promise on A.'s part, but of a solemn formal act by which A. has created such obligation, and has furnished evidence of that obligation which he is not permitted, at common law, to contradict. So little weight, in fact, did the idea of promise have in such cases, that a promise under seal to pay a definite sum of money was enforceable originally only by the action of debt, which was in its nature a real action, brought to recover property; and it was not until the seventeenth century that the action of covenant, which had come to be founded on the idea of promise, was allowed.<sup>1</sup>

In every simple contract there may be said to be a promise. "Assurance," however, is a more accurate term than "promise"; for promise looks only to the future, while assurance is independent of tenses. A warranty, for example, that a horse is sound, or that a ship has sailed from port, is a contract; but it would require a stretch

<sup>1</sup> Pollock and Maitland, *Hist. Eng. Law*, II. 217; Ames, 2 *Harv. Law Rev.* 56.

## 14      ELEMENTS OF THE LAW OF CONTRACTS.

of the word "promise" to make it apply to such warranties. In all simple contracts, however, there is always an assurance which may be in regard to the past, present, or future, and may be made with reference to some act within or not within the control of the party giving the assurance. When the assurance is that an event within the control of the party giving the assurance will happen, the assurance is properly a promise. The word "promise," however, has practically become a technical term, and is generally used as equivalent to the more comprehensive term "assurance."

Whether a person who makes a contract is bound to perform it, or whether he simply assumes the risk of having to pay damages is an important question, which will be discussed hereafter in connection with the subject of remedies for breach of contract.

## PART II.

### THE HISTORY OF CONTRACTUAL ACTIONS.

THE law of contracts has sometimes been treated as if the conception of contractual obligation had always existed. It seems clear, however, that the general idea of contractual obligation was unknown to our Anglo-Saxon ancestors, and that only in very recent times has that idea become fully developed. To understand the manifold inconsistencies and apparently arbitrary rules with which the student of contract law is constantly confronted, it is absolutely necessary to understand the development through long ages of our modern ideas of contract. Only in the last few years has historical research given us a satisfactory account of this development. Although there are still unsettled points in our legal history, it is now possible to understand in a general way the history of contract in English law.

The history of English law is very largely the history of English procedure. In the early English law, as in the primitive law of other countries, the trial of a lawsuit did not involve a judicial determination of the merits of the case by a judge or jury upon the evidence offered by the parties. "The conception of the trial," says a learned writer, "was that of a proceeding between the parties, carried on publicly under forms which the community oversaw."<sup>1</sup> The old forms of trial were by

<sup>1</sup> J. B. Thayer, 5 *Harvard Law Rev.* 46.



a record, by charters or documents, by witnesses, by the party's oath with or without fellow swearers, by the ordeal, and by battle. The last two methods need only be mentioned, but the others are important on account of their effect on the law of contracts. And first as to trial by witnesses. These did not resemble our modern witnesses; in fact, they were really triers, not witnesses at all in the modern sense. Their testimony was not subject to any consideration by judge or jury; their oaths given in proper form were conclusive.<sup>1</sup>

In the trial by oath, the defendant was compelled to clear himself of the charge brought against him by the plaintiff by swearing to his innocence. Sometimes his own oath was sufficient, but more commonly he had to produce a certain number of fellow swearers, called compurgators. The number of compurgators varied with the rank of the parties and of the compurgators, with the value of the property if property were involved, and with the nature of the suit.<sup>2</sup> The most usual number of compurgators seems to have been eleven. These compurgators swore, not to the facts in the case, but to the truthfulness of the defendant's oath, or to their belief in its truth. This mode of trial was also called wager of law. At first very common, it came to be used chiefly in detinue and in debt on simple contract. Wager of law never secured more than a precarious foothold in the United States, and was abolished in England in 1833.<sup>3</sup>

Trial by record was used to determine the existence of facts alleged to have happened in court. The records of the superior courts, whether proved orally or by

<sup>1</sup> Bigelow, History of Procedure, p. 308.

<sup>2</sup> *Ibid.* 301.

<sup>3</sup> Thayer, 5 Harvard Law Rev. 63.

inspection, were indisputable; those of the inferior courts could be impeached.<sup>1</sup>

In the case of trial by charter, the charter was produced at the trial. If it appeared to be genuine, the party who executed it was held to be bound by his solemn act or deed, and all statements and promises therein contained were binding on him in favor of the other party to the deed. The Saxon method of executing a deed was for the party to subscribe his name if he could, and in any case to affix the sign of the cross.<sup>2</sup> Seals were sometimes used, but were not essential to the validity of the deed. The Normans were more accustomed to the use of seals, and after the Norman conquest the seal came to be essential to the validity of the deed; but so late as the reign of Henry II. we have strong evidence that the use of seals was common only among great men.<sup>3</sup> Centuries later, in *Pillans v. Van Mierop*,<sup>4</sup> one of the greatest of English judges held a promise in writing to be binding without a seal; but his decision proved of little consequence, as it was soon overruled by the House of Lords.<sup>5</sup>

When the charter was produced in court, the judge determined its genuineness by comparison of the seal with other seals of the same party, if possible; otherwise, the party producing the charter might prove the seal by means of the duel. When it was once established that the seal was the defendant's, he was held bound by the deed, although the seal had been affixed without his consent; but if he had lost his seal he was not responsible for its use; provided, at least, that he

<sup>1</sup> Bigelow, *History of Procedure*, p. 319.

<sup>2</sup> Blackstone's *Com.*, II. 305.

<sup>3</sup> *Abbot Walter v. Baillol*, Bigelow, *Placita Ang.-Norm.* 175.

<sup>4</sup> 3 Burrow, 1663; L. 177.

<sup>5</sup> *Rann v. Hughes*, 7 T. R. 350, note a; L. 187.

had given public notice of its loss.<sup>1</sup> The evidence afforded by the deed could only be contradicted or overcome by other evidence of an equally satisfactory character. Oral testimony was inadmissible to impeach or to modify the effect of a deed when the genuineness of that deed was once established, — a rule which still prevails in common law courts.

Justice in the king's courts was administered by means of the royal writ, directing the sheriff to summon the defendant to appear before the court unless before a certain day he should grant the plaintiff's demand. In modern times the idea prevails that, if a man has a legal right, he must have a legal remedy to enforce that right. In early days, however, a man's rights in the king's courts were limited by the writs which he could get from the chancery, whence the writs were issued. These writs were few in number. Those that we must consider are the writs of debt, covenant, and account. The most striking thing about these writs is this, that though debt, covenant, and account are all called actions *ex contractu*, the writs in these actions show that they did not proceed upon the ground of enforcing any contractual obligation. These writs were all *droitural* writs; that is to say, they all proceeded upon the theory that the defendant had certain property in his possession which belonged to the plaintiff, and commanded the defendant, "*juste et sine dilatione*," justly and without delay, to restore that property to the plaintiff.

The writ of debt had two forms. It was brought either in the *debet* and *detinet*, or in the *detinet* only, according to circumstances. When brought in the *debet* and *detinet*, the writ stated that the defendant owed and unjustly detained the debt. This form was used in

<sup>1</sup> Pollock, Contracts, p. 139.

cases where the suit was brought by the original creditor against the original debtor, or against his heirs, if the latter were liable for the debt. When brought in the *detinet* only, the writ simply stated that the defendant unjustly detained the debt. This form of the writ was used when the action was by or against an executor for a debt due to or from his testator. Debt in the *detinet* was also the proper action for the recovery of a specific amount of unascertained chattels. In this form the action closely resembled that of *detinue*, which was for the recovery of a specific chattel.<sup>1</sup>

A debt at common law is a specific sum of money or a fixed amount of chattels due from the debtor to the creditor. To-day the term is applied only where money is due. The ways in which a debt could be created at common law were strictly limited. The action of debt, in so far as it would lie to enforce a contract, was confined to those cases where the contract was either real or formal. Contracts arising from the receipt of a thing are termed real contracts, in analogy to the contracts *re* of the Roman law; contracts which derive their binding force from the weight attached by the law to the formal character of the act creating an obligation are termed formal contracts. The formal contracts enforced by the action of debt were evidenced by a record or by a charter. As to informal contracts, debt was used chiefly, if not exclusively, in four cases. The action would lie for money lent, for the price of goods sold, for arrears of rent due upon a lease for years, and possibly for money due from a surety, though legal historians are not agreed as to whether a surety could be bound except by deed. At any rate, if an action would ever lie against a surety except on a deed, such action had disap-

<sup>1</sup> Blackstone's Com., III. 155; Ames, 8 Harvard Law Rev. 260. note 1.

peared by the time of Edward III.<sup>1</sup> Laying aside the question of a surety's obligation, it will be noticed that the cause of action in debt is always either the receipt of a thing by the debtor from the creditor, or the execution of a deed which afforded conclusive evidence of the existence of the obligation set forth in the deed. In the Year Books the term "contract" was applied to the former class of transactions exclusively, while the contract under seal was described as a grant, an obligation, or a covenant.<sup>2</sup>

The thing from the receipt of which a debt arose came to be termed *quid pro quo*. It seems probable that services rendered by the plaintiff to the defendant would have been regarded, as they are to-day regarded, as on the same footing with goods sold and delivered.<sup>3</sup> A *quid pro quo*, then, was always some benefit rendered by the creditor to the debtor. A benefit rendered to a third person, however, was not a sufficient *quid pro quo* to support an action of debt, though the defendant had expressly promised to pay therefor. This rule was finally modified so that the action of debt was allowed wherever the benefit was conferred on a third person at the defendant's request, provided such third person incurred no liability for the benefit received.<sup>4</sup>

The writ of covenant was used to enforce a covenant or promise. It was originally confined to covenants concerning land,<sup>5</sup> and the judgment might be, in certain cases, for the recovery of the land which the defendant had agreed to convey; thus showing the droitural char-

<sup>1</sup> In favor of the surety's liability, see Pollock and Maitland, Hist. Eng. Law, II. 208; Holmes, Common Law, 264; *contra*, Ames, 8 Harv. Law Rev. 252.

<sup>2</sup> Ames, 8 Harv. Law Rev. 253, note 3.

<sup>3</sup> Pollock and Maitland, Hist. Eng. Law, II. 209.

<sup>4</sup> Ames, 8 Harv. Law Rev. 262, 263.

<sup>5</sup> *Ibid.* 253.

acter of the writ, in which the breach of the defendant's covenant was looked upon as constituting a detention of the plaintiff's property.<sup>1</sup>

Though the practice seems to have varied at first, by the end of the fourteenth century the rule became firmly established that the covenant must be under seal, and the term "covenant" to-day means a promise under seal.<sup>2</sup> This rule requiring a seal to every covenant prevented the writ of covenant from becoming a general remedy for the enforcement of contracts.

The writ of account was used to compel a bailiff or factor to account for moneys received by him on behalf of his employers. It was used chiefly in the fourteenth and fifteenth centuries, and practically disappeared with the progress of equitable jurisdiction in such cases.<sup>3</sup>

It is clear, then, that the king's courts recognized no general theory of contractual obligation. There were certain special obligations which might be enforced by the appropriate writs, but the technicalities of the rules of procedure prevented any development of a theory of contracts. The manorial courts, however, and doubtless other inferior courts, were not so strict in their rules of evidence, and seem to have enforced agreements more liberally.<sup>4</sup> The ecclesiastical courts, moreover, regarded the *læsio fidei*, or breach of plighted faith, as a sin demanding ecclesiastical penalties. Their jurisdiction was restricted, however, and seems to have had little or no influence on the development of the law of contracts in the king's courts. It is to the celebrated Statute of Westminster II., 13 Edw. I. c. 24, that the modern law of contracts owes its most important features.

On account of the limited number and narrow scope of

<sup>1</sup> Pollock, 6 Harv. Law Rev. 400.

<sup>2</sup> *Ibid.* 401, 402.

<sup>3</sup> *Ibid.* 399-401.

<sup>4</sup> 4 Selden Soc. 115.

## 22    ELEMENTS OF THE LAW OF CONTRACTS.

the king's writs, many wrongs were committed for which there was no remedy in the king's courts. This unfortunate condition of affairs led to the passage of the statute just mentioned, which provided that where there was a wrong, which, though analogous, was not within the scope of the writs in common use, the chancery clerks might issue a like writ *in consimili casu*, adapted to the circumstances of the particular case. This statute led to the introduction of writs of trespass on the case. The writ of trespass proper could be used only where the wrong complained of had been committed by the use of force by the defendant. The force might be very slight, and yet trespass would lie; but for negligence and fraud there was no remedy. It was the unauthorized contract with the person or property of the plaintiff that was originally regarded as constituting a tort. The introduction of writs of trespass on the case gave a remedy where damages had resulted from the defendant's conduct with reference to the plaintiff's person or property, even though there was no forcible contract. Even in such cases, however, the defendant was not liable for negligence, unless he had expressly undertaken some task which he performed improperly, or unless the nature of his occupation required him to act with reasonable skill. Accordingly, a common carrier or common innkeeper was held liable for the loss of the plaintiff's goods intrusted to his care; but in the case of other bailees, the plaintiff had to allege and prove an undertaking on the part of the defendant to take charge of the goods.<sup>1</sup> So, in the case of a surgeon who was sued for negligence causing the death of the plaintiff's horse, it was held that the plaintiff must show either that the surgeon was a common surgeon to cure such horses, or that he had expressly

<sup>1</sup> Ames, 2 Harv. Law Rev. 6.

## THE HISTORY OF CONTRACTUAL ACTIONS.

undertaken to cure the plaintiff's horse.<sup>1</sup> From the necessity of alleging an undertaking, or *assumpsit*, in such cases, these writs were known as writs of trespass on the case in *assumpsit*. In the course of time, however, it came to be held that the defendant's negligence, and not his undertaking, was the gist of the action, so that the *assumpsit* was finally omitted.<sup>2</sup>

Another class of actions on the case included actions of deceit against the vendor of a chattel upon a false warranty. Here too an express warranty was necessary to charge the defendant, except in the case of one who, like a taverner or vintner, was bound by the nature of his occupation to sell articles of a certain quality.<sup>3</sup>

For the class of actions that most nearly resembled the modern action of special *assumpsit*, however, we must turn to actions on the case for deceit for the simple breach of a parol promise. It was generally held that the action would not lie, because the plaintiff counted on a promise and showed no specialty. In the fifteenth century, however, the courts allowed the action whenever the plaintiff had been induced to part with money or property on the strength of the defendant's promise, and the doctrine was soon extended so that the action might be brought whenever the plaintiff had incurred any detriment by acting on the defendant's promise. Although the allegation of deceit lingered till the present century, the action for breach of a parol promise had come to be regarded as an action *ex contractu*, and had developed into the action of special *assumpsit*.<sup>4</sup>

The action of *indebitatus assumpsit* originated in the sixteenth century. The foundation of the action was a debt due from the defendant to the plaintiff, and a promise by the defendant to pay that debt. By the

<sup>1</sup> Ames, 2 Harv. Law Rev. 4.

<sup>2</sup> *Ibid.* 7.

<sup>3</sup> *Ibid.* 9.

<sup>4</sup> *Ibid.* 10-16.



## 24 ELEMENTS OF THE LAW OF CONTRACTS.

decision in *Slade's Case*,<sup>1</sup> in 1603, the promise was rendered unnecessary, the court holding that proof of a simple contract debt was sufficient to support the action without proof of any promise to pay. The allegation of the undertaking, however, still remained necessary, the *assumpsit* becoming a fiction, though a necessary one.<sup>2</sup> *Indebitatus assumpsit* finally became a concurrent remedy with debt in all cases except where the debt was due by record, specialty, or for rent. It was also extended to most cases of quasi-contracts, as, for example, where the defendant had received money which in equity and good conscience belonged to the plaintiff.<sup>3</sup>

The action of *assumpsit* in the seventeenth century was extended to cases of contracts implied in fact; and the party who furnished goods or rendered services to another was allowed to recover on a *quantum meruit* or *quantum valebant*, by alleging a promise to pay what the goods or services were reasonably worth. A promise implied in fact was thus recognized by the courts; previously only an express promise had been considered binding.<sup>4</sup>

The ingenuity displayed by the common law courts, and the fictions they devised in extending the action of *assumpsit*, may have been due in some degree to the jealousy of the Court of Chancery entertained by the common lawyers. It is not possible here to trace the origin and growth of equity jurisdiction; suffice it to say, that persons who could get no redress in the common law courts applied to the Lord Chancellor, as "keeper of the king's conscience," for relief; and that the relief afforded by the courts of equity tended constantly to make suitors turn thither rather than to the common law courts, where there was so often either no adequate

<sup>1</sup> 4 Rep. 92 a.

<sup>2</sup> 2 Harv. Law Rev. 16, 17.

<sup>3</sup> *Ibid.* 63-69.

<sup>4</sup> *Ibid.* 58.

remedy or no remedy at all. A court of equity had no general jurisdiction to enforce contracts; but its jurisdiction over cases of fraud and trust gave suitors so much relief that the common law judges devised the various fictions by which the action of assumpsit was extended, partly to promote justice, but partly, no doubt, to retain their jurisdiction over cases which otherwise would have gone into the equity courts. The extension of the action of assumpsit was accompanied by a restriction of the jurisdiction of the courts of equity.

The action of assumpsit became the ordinary mode of enforcing all simple contracts. *Indebitatus assumpsit* had two great advantages over the action of debt. First, the former action rendered pleading less difficult. In debt the cause of action had to be stated very carefully and particularly. In *indebitatus assumpsit*, the debt was only the inducement to the *assumpsit*, and the plaintiff had only to state the general nature of his cause of action. Secondly, in debt on simple contract the defendant could wage his law, while in assumpsit the plaintiff could submit his case to a jury.<sup>1</sup>

It is clear, therefore, that there is no general theory of contracts to be found in the common law; which explains the zeal with which more than one writer has turned to the Roman law for a scientific and rational analysis of contract. The reason that there is no common law theory of contracts is simple enough, however. Our ancestors were familiar with debt and covenant and account and assumpsit, but in their legal reasoning their inquiry always was, "Will debt lie? or covenant? or account? or assumpsit?" We have, therefore, a theory of debt, a theory of covenant, of account, of assumpsit;

<sup>1</sup> 2 Harv. Law Rev. 57.

but we have no theory of contracts except what has been developed in very recent times from a combination of the different theories already existing. To attempt to establish any theory of contract which does not rest on the rules and ideas governing the courts in their actual decisions is a grave mistake. To construct a scientific theory upon those rules and ideas is possible only by the exclusion of the notion that the same principles must always govern classes of contracts which have a widely different history.

## CHAPTER I.

## THE FORMATION OF CONTRACT.

## § 1. Introductory.

We have defined contractual obligation as that obligation which is imposed by the law in consequence of a voluntary act, and which is determined as to its nature and extent by that act. From this definition it will be seen that there are four distinct elements essential to the existence of contractual obligation. These are, first, that the party bound should do an act; secondly, that this act should be voluntary; thirdly, that the act should define the extent of the obligation, and the conditions of its creation; and fourthly, that the law should impose that obligation as the consequence of such act. With these four elements we shall deal in the order just given.

## § 2. Necessity of an Act.

And first, as to the necessity of an act. It is a fundamental proposition that mere inaction or silence can never subject any one to a contractual obligation. Elementary as this proposition must seem, the fact that the courts have been compelled more than once to pass upon it shows that its true import has not always been clearly understood. The following instances will illustrate the general principle.

A. writes to B. offering B. \$100 for his horse, and adding, "if I hear no more about him I consider the horse is mine at \$100." B. fails to answer the letter

and A. claims that such silence amounts to a contract to sell the horse. But B. has done nothing, and there is therefore no contract.<sup>1</sup>

A.'s agent goes to B.'s agent and asks him to renew certain insurance policies issued by B. on A.'s property. B.'s agent says nothing. There is no contract of renewal.<sup>2</sup>

A. buys goods of B. B. notifies C. that the goods will be charged to C. C. says nothing. C. is not liable for goods furnished A. before or after such notice, having done nothing.<sup>3</sup>

It has been said that an act is necessary on the part of the party to be charged. The term "act" is here used in its broadest sense, to include not merely a single act, but a course of conduct. Present silence may be so coupled with previous speech, present inaction with previous action, that the silence and the speech, the action and the inaction, must all be taken together in order to determine the effect of a person's conduct.

Whenever then the previous relations between the plaintiff and defendant have been such that silence by the defendant on a particular occasion justifies the plaintiff in assuming that the defendant intended to bind himself, the defendant is bound, not by his silence, but by his silence taken in connection with his previous conduct. This principle is well illustrated by the case of *Hobbs v. Massasoit Whip Co.*<sup>4</sup>

The plaintiff in that case sent some eel-skins to the defendant. The defendant declined to accept the skins, but the plaintiff received no notice of its

<sup>1</sup> *Felthouse v. Bindley*, 11 C. B. N. S. 869.

<sup>2</sup> *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6; 12 A. 607; W. 514; H. & W. 21.

<sup>3</sup> *Grice v. Noble*, 59 Mich. 515; 26 N. W. 688.

<sup>4</sup> 158 Mass. 194; 33 N. E. 495; H. & W. 24.

refusal. The skins were kept by the defendant some months, and were then destroyed. The plaintiff then sued for the price of the skins. He had sent eel-skins in the same way to the defendant several times before, and they had been accepted and paid for. In fact there was a standing offer for such skins. "In such a condition of things," said the court, "the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance."

**§ 3. The Act must be Voluntary.**

Contractual obligation being recusable, the act which gives rise to it must be voluntary. An act is voluntary whenever it is caused by the will of the party doing it. The will in this respect must be sharply distinguished from the other functions of the mind. An insane person has a will, although his intellect is unsound. He may be entirely unable to appreciate the consequences of an act; but if he is capable of a conscious intention of doing that act, he is capable of making a contract at common law.<sup>1</sup> The validity of such a contract when made is another question, which will be discussed later, under the head of insanity.<sup>2</sup> Many writers attempt to make contract rest on agreement; but whatever be the function of agreement in the Roman law, the existence of contractual obligation in the common law is to be deter-

<sup>1</sup> *Imperial Loan Co. v. Stone* (1892), 1 Q. B. 599.

<sup>2</sup> *Post*, p. 234.

mined by reference to the state not of the intellect, but of the will. Volition, not consent, is the foundation of contract in our law; for how can consent be predicated of a lunatic? How can there be a "meeting of minds" when one of the parties to the contract has lost his mind?

If the act is caused by the will of the party acting, it is a voluntary act in the legal sense, however involuntary it may seem in the popular acceptance of the term. Thus, an act is voluntary, although caused by duress. The will in such a case is influenced by threats, but still it acts. No matter what force is used by another to bring about the act, the act is voluntary so long as that force acts only upon the motives of the party acting. A contract is a contract, therefore, though executed under duress. The right of the injured party to avoid the contract does not alter the fact that the contract exists until it is avoided.

**§ 4. The Act must determine the Extent of the Obligation.**

The act which gives rise to the contractual obligation also determines the extent of that obligation. The act in question, therefore, must be of such a character that the court can determine accurately the obligation which must result from it. This does not mean that the act giving rise to the obligation must be of such a character that the court can determine its meaning unaided. A contract may be made in a foreign tongue, or may contain abbreviations or technical terms which are utterly unintelligible to the court without further explanation. The maxim of the law is, *Id certum est quod certum reddi potest*, — "That is certain which can be rendered certain." All that is necessary is that the court should be able to determine from the language or conduct of

the party to be bound what obligation he incurred, and what were the conditions of that obligation.

The following instances will serve to show what the courts have or have not regarded as being sufficient to enable them to determine with certainty the extent of an obligation.

In *Taylor v. Brewer*,<sup>1</sup> A. agreed with B. to perform certain services for such remuneration as should be deemed right, and the court held that B.'s promise was too indefinite to create a legal obligation; while in *Henderson Bridge Co. v. McGrath*,<sup>2</sup> it was held that the jury must determine whether a statement by an agent, that his principal would "do what was right" in regard to paying for certain work, was made with a contractual intent or not. In the former case, the amount to be paid was left entirely to the option of the defendant; in the latter case, it seems to have been a question of fact whether there was a promise to pay a reasonable compensation or not.

A promise to pay good wages has been held void for uncertainty.<sup>3</sup>

A promise to execute a deed of separation containing the "usual covenants" has been held sufficiently certain.<sup>4</sup>

Where a trader borrowed money and agreed to pay a certain amount of interest, "with due allowance in a fair and reasonable manner," in case the borrower's profits should prove deficient, the court held the agreement void for uncertainty.<sup>5</sup>

A promise to convey one hundred acres of land, the land not being described, is too uncertain to be enforced.<sup>6</sup>

<sup>1</sup> 1 M. & S. 290.

<sup>2</sup> 134 U. S. 260; 10 S. Ct. 730.

<sup>3</sup> *Fairplay School Tp. v. O'Neal*, 127 Ind. 95; 26 N. E. 686.

<sup>4</sup> *Hart v. Hart*, 18 Ch. D. 670. <sup>5</sup> *Re Vince* (1892), 2 Q. B. 478.

<sup>6</sup> *Sherman v. Kitsmiller*, 17 S. & R. 45; H. & W. 157.



A promise by a man that, if his niece would live with him, he would give her a good house as long as he lived, and provide for her at his death, has been held too indefinite.<sup>1</sup>

Where a father made a promise to his son in consideration that the latter would stop making complaints of unfair treatment, the consideration was held too indefinite.<sup>2</sup>

Where a divorced husband promised his wife to pay her an allowance if she would conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, the promise was held binding.<sup>3</sup>

Where A. bought a horse from B., and promised that if the horse was lucky to him he would give five pounds more, or the buying of another horse, A.'s promise was held too vague.<sup>4</sup>

A promise to refrain from engaging in a certain business "as far as the law will allow" will not be enforced. The contract is construed as a contract in general restraint of trade, which is illegal; and the limitation "as far as the law will allow" is too indefinite to be regarded as modifying the general restraint.<sup>5</sup>

**§ 5. The Law must impose Obligation as the Result of the Act.**

The circumstances under which the law will impose obligation as the result of a voluntary act vary according as the contract is unifactoral or bifactoral. There are certain general principles, however, which are equally applicable to both kinds of contracts, and which will therefore be stated here.

<sup>1</sup> Walls' Appeal, 111 Pa. St. 460; 5 A. 220.

<sup>2</sup> White v. Blunett, 23 L. J. Ex. 36.

<sup>3</sup> Dunton v. Dunton, 18 Vict. L. R. 114.

<sup>4</sup> Guthing v. Lynn, 2 B. & Ad. 232.

<sup>5</sup> Davies v. Davies, 36 C. D. 359; W. 77.

*(a) Contractual Capacity.*

An act which would otherwise impose obligation on the party doing it may fail to cause such obligation on account of the personal status of such party. The person whose acts thus fail to produce their normal result is said to lack contractual capacity.

Married women at common law had in general no contractual capacity, and therefore could not incur any contractual obligation.

Exceptions to this rule existed in the case of the wife of the king of England; of the wife of a man *civiliter mortuus*; <sup>1</sup> in the case of contracts touching separation and divorce; and by the custom of London in the case of a married woman's trading contracts. <sup>2</sup>

In equity a married woman could bind her equitable separate estate by an act showing her intention to do so. She could not bind herself personally, nor did her engagements create a charge upon her estate. The peculiar character of a married woman's separate estate has led to the suggestion that the separate estate "may be regarded as an artificial person created by courts of equity, and represented by the beneficial owner as an agent with full powers, somewhat in the same way as a corporation sole is represented by the person constituting it for the time being." <sup>3</sup> The power of married women to make contracts has everywhere been enlarged by legislation, so that their legal status must be determined in every case from the statute-book.

According to some authorities, an infant's contracts are void if they are necessarily prejudicial to him. The

<sup>1</sup> That is, an outlaw, a convicted felon, or one "professed in religion." Anson, *Contracts* (4th ed.), 117.

<sup>2</sup> *Ibid.* (8th ed.), 122, 123.

<sup>3</sup> See Pollock, *Contracts*, Appendix C, where the subject is fully discussed.

better view, however, as we shall see later, is that an infant's contracts are voidable, and not void; that his acts may give rise to contractual obligation, although such obligation may be imperfect.<sup>1</sup>

The establishment by judicial proceedings of the fact that a person is a lunatic (or, by statute, in many jurisdictions, a drunkard or a spendthrift) destroys the contractual capacity of that person.

Corporations are sometimes said to have no capacity to make contracts not authorized by their charters. The invalidity of *ultra vires* contracts, however, is due to a rule of public policy making such contracts illegal, and not to want of capacity on the part of the corporation.<sup>2</sup>

(b) *Reasonableness of Promisee's Conduct.*

One fundamental principle of contract law is that the party who maintains that the act of another has resulted in a contract must show that he himself had a right, as a reasonable man, to suppose that the other party intended to assume legal responsibility for such act.

(1) JESTS AND SOCIAL ENGAGEMENTS. — It follows, therefore, that mere social engagements, and promises made in jest,<sup>3</sup> cannot result in legal obligation. No reasonable man would suppose that a friend who accepted an invitation to dinner intended to assume legal liability in case of a failure to keep his engagement.

(2) INHERENT IMPOSSIBILITY. — No reasonable man would suppose that a promise to do a thing in its nature impossible was intended to create legal liability. Whether the impossibility be physical, as in the case of a promise to go to the moon, or legal, as in the case of a

<sup>1</sup> *Post*, p. 231.

<sup>2</sup> *Post*, p. 237.

<sup>3</sup> *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393; 12 S. Ct. 953.

<sup>4</sup> *Theiss v. Weiss*, 31 A. 63; 166 Pa. St. 9.

promise to discharge a man from an obligation to a third person, is of no consequence. A promise to do an impossible thing cannot in any case impose any obligation to do that thing, but if the impossibility is natural or legal, no responsibility whatever can attach to such a promise; while if the thing is not in its nature impossible, the promise may impose liability for its non-fulfilment.<sup>1</sup>

(3) EXECUTION OF WRITTEN INSTRUMENTS. — The law in regard to the execution of written instruments illustrates clearly the general principle that an act will give rise to contractual obligation only when the other party had a right to assume that the party acting intended to assume legal responsibility for such act. Thus, where an illiterate man executes a deed, it has been held for centuries that he is bound only by that part of the deed which is read to him.<sup>2</sup> And if the deed is falsely read to him, his act in signing, sealing, and delivering the instrument does not make it his deed.<sup>3</sup> The same rule holds in the case of a blind man,<sup>4</sup> or of one who has no opportunity to read for want of spectacles.<sup>5</sup> Nor does it make any difference whether the contents of the deed are misrepresented by the other party or by a stranger.<sup>6</sup>

<sup>1</sup> "I think it is not competent to a defendant to say that there is no binding contract merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted." Brett, J., in *Clifford v. Watts*, L. R. 5 C. P. 577; W. 19.

<sup>2</sup> Year Book, 14 H. VIII. 25, 26.

<sup>3</sup> *Thoroughgood's Case*, 2 Co. Rep. 9 b; *Rockford, &c. R. R. Co. v. Shumiels*, 65 Ill. 223; *Schuylkill County v. Copley*, 67 Pa. St. 386; *Stacy v. Ross*, 27 Tex. 3; *Davis v. Snider*, 70 Ala. 315.

<sup>4</sup> *Shulter's Case*, 12 Co. Rep. 90.

<sup>5</sup> *Simons v. Great Western Ry. Co.*, 2 C. B. N. S. 620.

<sup>6</sup> *Thoroughgood's Case*, *supra*; *Schuylkill County v. Copley*,

If a man can read, however, he is bound by the instrument which he executes without reading.<sup>1</sup> And one who cannot read is bound by his signature to a document which he does not ask to have read.<sup>2</sup> In both these cases the act of the party who executes the instrument sufficiently signifies his intention to be bound by it, and the actual state of his mind is therefore unimportant.

If a man can read, his act in executing a written contract is sufficient to establish a contract between the parties, even though the document has been misread to him. The contract in such a case may or may not be voidable, but it is not void.<sup>3</sup>

If, however, any trick or artifice is used to prevent the person who signs the document from reading it, the instrument is null and void; as where another instrument is surreptitiously substituted for the one which the signer intends to execute.<sup>4</sup>

The question of the liability of a person who signs a contract without knowing its contents has been rendered

*supra*. In *Hawkins v. Hawkins*, 50 Cal. 558, the court held that an illiterate person was bound by a contract which he signed, though its contents were misrepresented by the opposite party. This case seems unsound, and opposed to the current of authority from *Thoroughgood's Case* down. The better view is, that the burden of proof is on the party who seeks to establish the execution of a written instrument by an illiterate person, to show that the illiterate understood the contents of the instrument. *Selden v. Myers*, 20 How. 506; *Suffern v. Butler*, 18 N. J. Eq. 220.

<sup>1</sup> *Black v. Wabash, &c. Ry. Co.*, 111 Ill. 351; *Maine Mut. Marine Ins. Co. v. Hodgkins*, 66 Me. 109; *Sanger v. Dun*, 47 Wis. 615; 3 N. W. 388; *Bishop v. Allen*, 55 Vt. 423; *Goetter v. Pickett*, 61 Ala. 387.

<sup>2</sup> *Hallenbeck v. Dewitt*, 2 Johns. 404; *Pennsylvania R. R. Co. v. Shay*, 82 Pa. St. 198; *Weller's Appeal*, 103 Pa. St. 594.

<sup>3</sup> *Seeright v. Fletcher*, 6 Blackf. 380; *Hazard v. Griswold*, 21 F. 178; *Robinson v. Glass*, 94 Ind. 211.

<sup>4</sup> *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Champion v. Ulmer*, 70 Ill. 322; *Van Valkenburgh v. Ronk*, 12 Johns. 338.

unnecessarily confusing by the loose use of the word "fraud." A man is not bound by a contract which he is induced to sign by the fraudulent misrepresentation of the other party,<sup>1</sup> or of a third person by the contrivance of the other party,<sup>2</sup> it is true. Such contract is voidable on the ground of fraud. Where, however, some trick is used to substitute another instrument for the one he intends to sign, his signature has no legal effect, and there is no contract whatever, not because the other party was guilty of fraud, but because the person who perpetrated the fraud knew that the other party had no intention of executing the instrument in question.

Although the rules just given are the same whether one executes a deed or an ordinary written contract, the reason for the existence of the rule varies according as the instrument is or is not a deed. The binding force of a deed results from its delivery. Now delivery is a matter of intention. If A. intends to deliver a certain deed, it is his deed, no matter what his idea of its contents may be; but if he does not intend to deliver the deed, but some other piece of paper, the instrument he actually delivers is not his deed. In the case of a simple contract, however, the only reason that the writing is binding when it fails to express the intention of the party is because the writing is regarded as settling the terms of the contract, so that oral evidence is inadmissible at law to show that the real agreement of the parties was not that which the writing sets forth. In both cases, if one party has no reason to suppose that the other intends to execute the instrument, the apparent execution has no effect; and in both cases, if one party

<sup>1</sup> *Horschfeld v. London, &c. Ry. Co.*, 2 Q. B. D. 1; *Bliss v. N. Y., &c. R. R. Co.*, 160 Mass. 447; 36 N. E. 65; *Shrimpton v. Netzgorg*, 62 N. W. 343; — Mich. —.

<sup>2</sup> *Robinson v. Glass*, *supra*; *Archer v. California Lumber Co.*, 33 P. 526; 24 Or. 341.

has good reason to suppose that the other intended to *execute the instrument*, the instrument is the act of the party executing it, regardless of any fraud that may have been perpetrated on the signer. Fraud, in such cases, renders the act in question voidable; lack of reason to suppose the existence of an intention to execute the instrument renders the act void.

The foregoing rules as to the execution of written instruments apply where the parties to such instruments are concerned. The rights of third parties in such cases are governed by other principles. In the case of ordinary contracts, other parties may acquire rights by estoppel; in the case of negotiable instruments, they may be given rights by the law merchant.

#### § 6. Formal and Simple Contracts.

We pass now from the consideration of general principles to the examination of the particular rules governing the formation of different kinds of contracts. Contracts in English law, as we have seen, are of two classes, formal and simple. The obligation of formal contracts is due to the weight attached by the law to the formal character of the act giving rise to the obligation. Simple contracts are binding for other reasons, hereafter to be explained.

##### (a) *Formal Contracts.*

The existence of formal contracts in our law is due to the rules of evidence previously discussed in connection with the history of contractual actions. Acts were classified according to the evidence by which they were proved. The highest form of evidence known to the law is a judicial record; next comes a deed, and last of all oral testimony. Formal contracts in our law are those the existence of which is established either by a record

or by a deed. The former are termed contracts of record, the latter specialties.

(1) **CONTRACTS OF RECORD.**—A judicial record is taken as absolutely true and binding between the parties thereto, and those in privity with them. The record cannot be attacked collaterally; if it contains error, that error must be corrected by special proceedings for that purpose in the court that rendered it, or in some other court having jurisdiction to correct the error.

Contracts of record are said to include judgments, recognizances, statutes merchant and staple, and recognizances in the nature of a statute staple. Statutes merchant and staple and recognizances in the nature of a statute staple have long been obsolete. A judgment is not a contract at all, but a judicial determination of fact entered of record. The sole reason for calling it a contract is, that an action of debt will lie upon it at common law. It seems, however, that a judgment entered by confession may be a true contract, since it is the result of a voluntary act, and the extent of the obligation is fixed by that act.

A recognizance is a true contract. It is an obligation in the form of an acknowledgment of a debt made before a judge or officer having authority for that purpose, and enrolled in a court of record.<sup>1</sup> The recognizer acknowledges that he is indebted in a certain sum, the obligation to be null and void if the recognizer do some act specified in the recognizance. The recognizance is used chiefly to bind a party to appear in court or to keep the peace, and ordinarily runs to the sovereign.

(2) **SPECIALTIES.**—Next to a judicial record the highest form of evidence is a charter, deed, or specialty. These are all instruments under seal, "charter" and "deed" being generic words, while "specialty" is

<sup>1</sup> Leake, *Contracts*, 141.



applied to obligations. The immense weight attached to a deed as evidence in early times has been already described. Proof of a party's deed was sufficient to prove the party bound by all statements and promises therein contained. Originally, in fact, the deed was the obligation, and if the deed were lost or destroyed, the obligation also disappeared.<sup>1</sup>

In ancient times, as we have seen, proof of the seal was sufficient proof of the genuineness of the deed. To-day, however, the essential requisites of a deed are, first, that it should be in writing on paper or parchment;<sup>2</sup> secondly, that it should be signed; thirdly, that it should be sealed; and fourthly, that it should be delivered.

(a) *Signing*. — Signing was the Saxon method of authenticating a deed. After the Norman Conquest, however, seals came into vogue, and the seal became the means of authentication, while the signature came to be regarded as unimportant. The Statute of Frauds, which required many instruments to be in writing, signed by the party executing them, did not apply to deeds;<sup>3</sup> so that in England the requirement of a signature seems even to-day unessential.<sup>4</sup> In this country, the universal practice of signing deeds would seem to make signing necessary. The signature, of course, may be by mark; and a party is bound by his signature written by another person in his presence and by his direction.<sup>5</sup>

(b) *Sealing*. — As to what constitutes a seal, the student must consult the statutes and decisions of his own jurisdiction. According to Coke, a seal is wax

<sup>1</sup> Ames, 9 Harv. Law Rev. 49.

<sup>2</sup> Sheppard's Touchstone, 54. This requirement barred out wooden tallies, which were once used as evidence of contracts. Pollock, Contracts, 144.

<sup>3</sup> Cherry v. Heming, 4 Ex. 631, 636.

<sup>4</sup> Anson, Contracts (8th ed.), 52; Leake, Contracts, 113.

<sup>5</sup> Gardner v. Gardner, 5 Cush. 483.

impressed. An impression on paper is now generally held sufficient.<sup>1</sup> By statute in many States a scrawl or scroll affixed by way of seal is sufficient. In some States, in order that such a scrawl shall constitute a seal there must be a recital in the deed that the scrawl was affixed as a seal.<sup>2</sup>

(c) *Delivery*. — Delivery is to-day essential to the validity of a deed. In order to constitute delivery, it is not necessary that the maker of the deed should part with the custody of the deed. All that is necessary is that the maker should do or say something to show that he intends the deed to be presently binding on him.<sup>3</sup> An unexpressed intention is insufficient.<sup>4</sup>

A deed may be delivered conditionally, not to take effect until some condition is fulfilled. The deed is then said to be delivered in escrow, and is called an escrow. The general rule in America is that a deed cannot be delivered in escrow to the grantee.<sup>5</sup> The English rule was formerly the same,<sup>6</sup> but whether it is still in force seems doubtful.<sup>7</sup>

(d) *Acceptance*. — To the requirement that the deed must be delivered, some American courts have added the requirement that it must be accepted by the grantee or

<sup>1</sup> *Pierce v. Indreth*, 106 U. S. 546; 1 S. Ct. 418.

<sup>2</sup> *Cromwell v. Tate*, 7 Leigh, 301; *contra*, *Eames v. Preston*, 20 Ill. 389.

<sup>3</sup> *Xenos v. Wickham*, L. R. 2 H. L. 296; *Mitchell v. Ryan*, 3 Ohio St. 377.

<sup>4</sup> *Barnes v. Barnes*, 161 Mass. 381; 37 N. E. 379.

<sup>5</sup> *Stevenson v. Crapnell*, 114 Ill. 19. This was the rule laid down in the early cases in New York (*Braman v. Bingham*, 26 N. Y. 483; *Wallace v. Berdell*, 97 N. Y. 13); but this rule has recently been restricted so that it applies only to deeds relating to real estate. *Blewitt v. Boorum*, 37 N. E. 119; 142 N. Y. 357.

<sup>6</sup> *Sheppard's Touchstone*, 59.

<sup>7</sup> *Leake, Contracts*, 115; *Anson, Contracts* (8th ed.), 53; *Hudson v. Revett*, 5 Bing. 387.

obligee. The English rule is, "If A. make an obligation to B., and deliver it to C., this is the deed of A. presently. But if C. offers it to B., then B. may refuse it *in pais*, and thereby the obligation will lose its force."<sup>1</sup> Some of the American courts follow the common law rule;<sup>2</sup> others assert that the acceptance of the deed by the grantee or obligee is essential to its validity.<sup>3</sup> It is often said the assent of the grantee or obligee to the deed will be presumed if the deed is beneficial to him;<sup>4</sup> but it is not very clear whether this presumption of acceptance is a presumption of fact, from which the jury may or may not infer the acceptance of the deed; or whether it is a disputable presumption of law, enabling the party setting up the deed to dispense with evidence of an actual acceptance, but allowing the opposite party to defeat the deed by showing that there has never been any acceptance in fact; or whether it is a so-called conclusive presumption of law, making such a deed binding without acceptance.

The idea that acceptance of a deed is necessary comes from a mistaken notion that the validity of a deed rests on the mutual assent of the parties thereto. As has already been shown, the importance of a deed was due originally to the rule of evidence that a party was bound by all statements and promises therein contained. The theory that mutual assent had any connection with the making of a deed was unknown to the common law. The requirement of delivery, originally unnecessary, was added in order to make the deed what it purported

<sup>1</sup> *Butler and Baker's Case*, 3 Co. Rep. 26 b; *Xenos v. Wickham*, L. R. 2 H. L. 296.

<sup>2</sup> *Jones v. Swayze*, 42 N. J. L. 279.

<sup>3</sup> *Welch v. Sackett*, 12 Wis. 243; *Derry Bank v. Webster*, 44 N. H. 264.

<sup>4</sup> *Dale v. Lincoln*, 62 Ill. 22; *Whitney v. Hale*, 30 A. 417; — N. H. —.

to be, the act and deed of the party bound by it. The theory that acceptance is necessary ignores the historical development of the contract under seal as a formal contract, dependent solely upon its execution for its validity, and consequently ignores the existence of unifactoral contractual obligation in our law. The advocates of this theory have attempted to turn the formal contract of English law into the consensual contract of the Roman law, which has no place in English jurisprudence.<sup>1</sup> In order to force an English obligation into a Roman classification it has been necessary to set up the extremely artificial idea that a deed is not a contract until it is accepted, but only "an offer which cannot be withdrawn."

(b) *Simple Contracts.*

(1) **NECESSARILY BIFACTORAL.** — Simple contracts are always bifactoral. A simple contract results from a primary act by one party, and a secondary act by the other. The primary act is always a promise, or, more accurately, an assurance. The secondary act constitutes the consideration for the promise, and makes it binding. And first as to the primary act, or promise.

(2) **THE PRIMARY ACT, OR PROMISE.** — The ways in which a promise can be made are innumerable. If the promise is made in words it is said to give rise to an express contract. If the promise is not made in words, the contract is said to be implied. There is no legal difference, however, between a promise made by words and one made by conduct. Any conduct which a reasonable man would regard as implying a promise is so regarded by the law. Certain special cases, however, require special explanation.

(a) *Acceptance of Benefits.* — When one person renders

<sup>1</sup> Hare, Contracts, 86.

services to another, or furnishes him with goods, with the expectation of being paid therefor; and the latter has reason to know that the former was acting with that expectation, the acceptance of the goods or services amounts to a promise by the party accepting them that he will pay the reasonable value of such goods or services. Thus where the plaintiff erected a party wall, partly on his own land, and partly on that of the defendant, the court held that "if the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff."<sup>1</sup>

If, however, the party benefited has no opportunity to reject the services in question, it is clear that he cannot be said to make any promise to pay for them. The Roman law recognized a certain obligation *quasi ex contractu* in such cases, but even such obligation is unknown to the common law.<sup>2</sup>

The rule that the defendant is not bound to pay for goods unless he accepts them with the knowledge or with reason to know that the plaintiff expects to be paid for them is well illustrated by the case of *Boston Ice Co. v. Potter*.<sup>3</sup> In that case A. had bought ice of B., but, becoming dissatisfied, had ceased to deal with B., and had made a contract for ice with C. Afterwards B. bought C.'s business without A.'s knowledge, and kept

<sup>1</sup> *Day v. Caton*, 119 Mass. 513; *Pattee's Cases on Contracts*, 190; *Fogg v. Portsmouth Athenæum*, 44 N. H. 115; H. & W. 10.

<sup>2</sup> *Taylor v. Laird*, 25 L. J. Ex. 329; *Bartholomew v. Jackson*, 20 Johns. 28; H. & W. 14.

<sup>3</sup> 123 Mass. 28; H. & W. 243. See also *Boulton v. Jones*, 2 H. & N. 564.

on delivering ice to A. as C. had done previously. When A. learned that the ice had been supplied by B., he refused to pay for it, and the court sustained him in his refusal. A. had accepted and used B.'s ice, and B. had expected to be paid for it; but A. had no reason to know of B.'s expectation when he consumed the ice, so that A.'s conduct did not amount to a promise to pay B. for the ice. So when A. appeared in a suit as attorney for the United States, with the expectation of being paid for his services by private clients who were interested in the suit, it was held that the allowance by the authorities of the use of the name of the United States as plaintiff created no liability on the part of the United States to pay for the services rendered by A.<sup>1</sup>

The general presumption that the acceptance of a benefit implies a promise to pay for it does not exist where the person conferring the benefit is a member of the same family with the person receiving it. In order that one member of a family should have a claim against another for board furnished or services rendered, it must appear that the circumstances were such as to entitle the person conferring the benefit to believe that the other intended to pay for it.<sup>2</sup> The family relation, not blood relationship, is what overcomes the ordinary presumption in such cases.<sup>3</sup>

(b) *Business Circulars and Proposals.* — It is clear that a mere inquiry about the price of goods does not constitute a promise to take any of the goods.<sup>4</sup> Nor

<sup>1</sup> *Coleman v. U. S.*, 152 U. S. 96.

<sup>2</sup> *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892; *Freeman v. Freeman*, 65 Ill. 106; *Bostwick v. Bostwick*, 71 Wis. 273; 37 N. W. 405; *Howe v. North*, 69 Mich. 272; 37 N. W. 213; *McGarvy v. Roods*, 73 Ia. 363; 35 N. W. 488; *Cann v. Cann*, 20 S. E. 910; — W. Va. —.

<sup>3</sup> *Wyley v. Bull*, 41 Kans. 206; 20 P. 855; *Thorp v. Bateman*, 37 Mich. 68.

<sup>4</sup> *Ahearn v. Ayres*, 38 Mich. 692.

does the statement that one holds property at a certain price amount to a promise to sell the property at that price.<sup>1</sup> Nor do business circulars and advertisements as a rule constitute representations that the party issuing them intends to incur legal liability thereby. To draw the line, however, between statements which do and those which do not amount to promises in the legal sense is by no means easy. The case of *Moulton v. Kershaw*<sup>2</sup> illustrates the practical difficulty which such cases present. In that case A. wrote to B. as follows:—

“Dear Sir, — In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car load lots of eighty to ninety-five bbls. delivered at your city, at 85 c. per bbl., to be shipped per C. & N. W. R. R. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.”

The plaintiff replied ordering 2,000 bbls. of salt. The court held there was no contract, construing A.'s letter “as a simple notice to those dealing in salt that the defendants were in a condition to supply that article for the prices named, and requesting the person to whom it was addressed to deal with them.”

(c) *Auctions*. — An announcement that an auction sale of property will be held at a certain time and place does not bind the owner of the property to put it up at auction.<sup>3</sup> If, however, the property is actually put up at auction, and the sale is without reserve, the auctioneer is bound to knock down the property to the highest bidder.<sup>4</sup> But the mere solicitation of proposals for the

<sup>1</sup> *Harvey v. Facey* (1893), A. C. 552; *Knight v. Cooley*, 34 Ia. 218.

<sup>2</sup> 59 Wis. 316; 18 N. W. 172; H. & W. 67.

<sup>3</sup> *Harris v. Nickerson*, L. R. 8 Q. B. 286.

<sup>4</sup> *Warlow v. Harrison*, 1 E. & E. 295.

doing of work,<sup>1</sup> or for the purchase of property,<sup>2</sup> imposes no obligation on the solicitor to accept the lowest bid for the work, or the highest bid for the property.

In the case of an auction it must be noticed that there are three distinct acts on the part of the auctioneer. First, there is the announcement of the sale. This announcement, as we have just seen, gives rise to no legal obligation. Secondly, there is the actual offer of the property for sale. This offer is a promise to sell to the highest bidder, and the man who bids the highest has furnished the consideration for the promise, which thereupon is turned into a unilateral contract on the part of the auctioneer to knock down the property to the highest bidder. Finally, the bidder in turn promises to take the property at the price which he bids, and when the auctioneer accepts his bid by knocking down the property to him, we have a bilateral contract, consisting of mutual promises, on the one side to buy, on the other to sell.

(d) *Time Tables*. — The publication of time tables by a railway company has been held to amount to a promise that the company will use due care and skill to transport its passengers punctually according to such time tables.<sup>3</sup>

(e) *Acceptance of Documents*. — A bailee who receives the goods of another has certain duties imposed upon him by law with reference to the safe-keeping of such goods. These duties, however, may be modified by contract between the bailor and the bailee. So, too, the duty of a common carrier to receive goods or passengers, and to transport them to their destination, which exists

<sup>1</sup> *Leskie v. Haseltine*, 155 Pa. St. 98; 25 A. 886.

<sup>2</sup> *Spencer v. Harding*, L. R. 5 C. P. 561; W. 470.

<sup>3</sup> *Gordon v. Manchester, &c. R. R. Co.*, 52 N. H. 596; *Sears v. Eastern R. R. Co.*, 14 Allen, 433.



independently of contract, may be modified by contract in like manner. The most common mode in which a carrier or other bailee attempts to limit his liability is by means of written or printed stipulations contained in a ticket, bill of lading, receipt, or other document which is given to the bailor, shipper, or passenger. The effect of such a document has often been considered by the courts.

When a receipt, ticket, or bill of lading is signed by the person receiving it, this of course constitutes a promise by the signer to be bound by the terms thereof, and this though he does not read the document, and is ignorant of its terms.<sup>1</sup> When the person receiving the document does not sign it, he is bound by its terms if he knows what they are. He is also bound if he knows or has reason to know that he is receiving a document containing the terms of a contract, and those terms are reasonably brought to his notice; and this on the ground that the person taking such document so acts as to represent to the other party that he has looked at it and read it, or is content to be bound by its contents without ascertaining them.

The foregoing principles are clearly illustrated by the following cases. A. deposits his luggage with B. for safe keeping, receiving a ticket, on the face of which, together with other writing, are the words "subject to conditions on the other side." A. knows that there are conditions on the ticket, but does not read them. A. is bound by the conditions of the ticket.<sup>2</sup>

A. deposits his luggage with B., receiving a ticket containing conditions on the back, with the words, "See back" on the face of the ticket. A. knows there is writing on the ticket, but does not know that the writing contains conditions. A. is bound by the conditions if

<sup>1</sup> *Boylan v. Hot Springs R. R. Co.*, 132 U. S. 146; 10 S. Ct. 50.

<sup>2</sup> *Harris v. Great Western Ry. Co.*, 1 Q. B. D. 515.

he has reasonable notice of them; and the question of reasonable notice is for the jury.<sup>1</sup>

A. accepts a ticket or receipt which shows on its face that it contains the terms of a contract. A. is bound by the terms of the document.<sup>2</sup>

A. purchases a railway ticket bearing on its face the words "Dublin and Whitehaven." On the back are certain conditions limiting the liability of the railway company. A. knows nothing of the existence of the conditions. He is not bound by them, because there is nothing on the face of the contract to connect the words on the face with the conditions on the back.<sup>3</sup>

When the document is received under such circumstances that the party receiving it has no reason to suppose that it contains the terms of a contract, such party is not bound by its terms.<sup>4</sup> Therefore, where a receipt containing conditions is delivered to a foreigner who cannot read English, and who has no actual notice of the conditions, he is not bound by them.<sup>5</sup>

In the case of a bill of lading, acceptance by the shipper of the bill of lading is construed very differently by different courts. It is held, on the one hand, that the custom of carriers to limit their liability by stipulations and conditions contained in the bill of lading is so universal that the consignor is bound to know that the

<sup>1</sup> *Parker v. S. E. Ry. Co.*, 2 C. P. D. 416; followed and approved in *Richardson v. Rowntree* (1894), A. C. 217.

<sup>2</sup> *Belger v. Dinsmore*, 51 N. Y. 166; *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 27 N. E. 665; H. & W. 15.

<sup>3</sup> *Henderson v. Stevenson*, L. R. 2 Sc. App. 470; *Brown v. Eastern R. R. Co.*, 11 Cush. 97.

<sup>4</sup> *Henderson v. Stevenson*, *supra*; *Brown v. Eastern R. R. Co.*, *supra*; *Simons v. Great Western Ry. Co.*, 2 C. B. N. S. 620; *Madan v. Sherard*, 73 N. Y. 329; *Blossom v. Dodd*, 43 N. Y. 264.

<sup>5</sup> *Camden & Amboy R. R. Co. v. Baldauf*, 16 Pa. St. 67.

receipt or bill of lading may contain such conditions, and that his acceptance of such receipt or bill of lading is a representation that he assents to its terms.<sup>1</sup> Other courts hold, however, that the acceptance of the receipt or bill of lading by the consignor is insufficient to bind him unless he expressly assents to the terms thereof, and this on grounds of public policy. Says the United States Supreme Court, "If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the very nature of the case this equality does not exist, and therefore every intendment should be made in favor of the shipper when he takes a receipt for his property with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights."<sup>2</sup>

(f) *Written Contracts.* — Whenever the parties have reduced the terms of the contract to writing, that writing is regarded as finally settling their respective rights and obligations, and all preliminary negotiations are merged in the contract.<sup>3</sup> Evidence that the writing did not constitute a completed contract is always admissible; but oral evidence to vary the terms of a written contract can never be received at law.<sup>4</sup> Such evidence is admitted, however, in equity, in those cases where it is offered to support or to oppose the exercise of the exclusive jurisdiction of equity, as in

<sup>1</sup> *Kirkland v. Dinsmore*, 62 N. Y. 171; *McMillan v. Michigan, &c. R. R. Co.*, 16 Mich. 79, 114-116; *Hutchinson on Carriers*, § 240.

<sup>2</sup> *Railroad Co. v. Mfg. Co.*, 16 Wall. 318, 329.

<sup>3</sup> *Van Ness v. Washington*, 4 Pet. 232; *Potomac Stbt. Co. v. Upper Potomac Stbt. Co.*, 109 U. S. 672; 3 S. Ct. 445; 4 S. Ct. 15; *Parish v. U. S.*, 8 Wall. 489; *Van Weel v. Winston*, 115 U. S. 228; 6 S. Ct. 22; *Ins. Co. v. Mowry*, 96 U. S. 544.

<sup>4</sup> *Oelricks v. Ford*, 23 How. 49; *Ins. Co. v. Mowry*, *supra*.

cases where the reformation or cancellation of a contract is sought.<sup>1</sup>

It is sufficient that the terms of the contract have been reduced to writing in order that the rules governing written contracts should apply; it is not necessary that the writing should be signed.<sup>2</sup> On the other hand, if the writing does not contain all the terms of the contract, the rules governing written contracts do not apply.

Writings which are sufficiently connected with each other may be regarded as constituting a written contract. The connection must be established by a reference in one writing to the other writing which it is sought to connect with the first.<sup>3</sup> If there is any ambiguity in such reference, oral evidence is admissible to identify the writing referred to.<sup>4</sup>

Where negotiations are carried on by correspondence, and the contract has to be gathered from different letters, everything that passed between the parties must be taken into consideration. It follows, therefore, that where two letters seem on their face to constitute a complete contract, it may still be shown that these letters did not constitute a contract, and that other terms not mentioned in the letters were to be agreed on subsequently.<sup>5</sup> Evidence of subsequent negotiations has been received to show that a contract apparently completed by correspondence was not regarded as finally settled by the parties.<sup>6</sup>

Oral evidence is admissible not only to show that a

<sup>1</sup> Leake, *Contracts*, 157, 158.

<sup>2</sup> *Hotson v. Browne*, 9 C. B. N. S. 442.

<sup>3</sup> *Brown v. Langley*, 4 M. & G. 466.

<sup>4</sup> *Oliver v. Hunting*, 44 Ch. D. 205; *Ridgway v. Wharton*, 6 H. L. 238; *Beckwith v. Talbot*, 95 U. S. 389.

<sup>5</sup> *Hussey v. Horne-Payne*, 4 A. C. 311.

<sup>6</sup> *Bristol Aerated Bread Co. v. Maggs*, 44 C. D. 616.

writing is not, as it purports to be, a contract, but also that it was executed conditionally, to be binding only on the happening of a certain event.<sup>1</sup>

Oral evidence of a collateral agreement is admissible, provided such collateral agreement does not contradict the terms of the written contract.<sup>2</sup>

(g) *Agreement for Future Contract.* — Persons often agree to enter into a contract in the future, and the question then arises whether such agreement is in itself a contract. If the agreement leaves any essential terms of the future contract to be determined, the agreement itself is not a contract.<sup>3</sup> So if the agreement shows that it was not intended to be binding until a formal contract had been executed.<sup>4</sup> The fact that the agreement refers to a contract to be drawn up in the future does not show conclusively that the parties did not intend to bind themselves until the formal contract was signed, although the fact that such formal contract was to be drawn up is evidence of the invalidity of the informal agreement.<sup>5</sup> Whether the informal agreement is binding or not is to be determined by the apparent intention of the parties in each case, taking all the circumstances into consideration.<sup>6</sup>

<sup>1</sup> *Wallis v. Littell*, 11 C. B. N. S. 369; *Moore v. Campbell*, 10 Ex. 323; *Ware v. Allen*, 128 U. S. 590; 9 S. Ct. 174; *Reynolds v. Robinson*, 110 N. Y. 654; 18 N. E. 127; *H. & W. 502*; *Wadsworth v. Warren*, 12 Wall. 307.

<sup>2</sup> *Angell v. Duke*, L. R. 10 Q. B. 174; *Thompson v. Ins. Co.*, 104 U. S. 252.

<sup>3</sup> *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Shepard v. Carpenter*, 54 Minn. 153; 55 N. W. 906; *Page v. Norfolk*, 70 L. T. 781.

<sup>4</sup> *Eads v. Carondelet*, 42 Mo. 113; *Page v. Norfolk*, *supra*; *Winn v. Bull*, 7 C. D. 29.

<sup>5</sup> *Ridgway v. Wharton*, 6 H. L. C. 238; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Allen v. Chontean*, 102 Mo. 309; 14 S. W. 869; *Crossley v. Maycock*, L. R. 18 Eq. 180.

<sup>6</sup> *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209; 39 N. E. 75; and cases *supra*.

## (3) THE SECONDARY ACT, OR CONSIDERATION. —

(a) *Origin of the Doctrine of Consideration.* — The doctrine of consideration has played so important a part in the English law of contract that consideration is often spoken of as an essential element of contract. In order to reconcile the idea that consideration is essential to a contract with the well known rule of law that a contract under seal is binding without regard to there being a consideration therefor, it has often been asserted that a seal "imports a consideration," or "is conclusive evidence of a consideration." Such statements are not merely erroneous, but absolutely misleading as to the very nature of a sealed instrument. As we have seen, it has been the rule for ages that the evidence afforded by a deed can only be overcome by evidence of an equally high character. The fact that a man has bound himself by deed is conclusive evidence that he is bound, not that he received a consideration for his promise. Nevertheless, so wide-spread is the erroneous idea that there is a real connection between the seal and the doctrine of consideration, that statutes have been passed in New York and other States, providing that a seal "shall be only presumptive evidence of a consideration."<sup>1</sup> The effect of such statutes is to change, not a rule of evidence, but the very nature of contracts under seal. A specialty is binding by reason of its form; a promise not under seal only by virtue of some consideration. The New York statute has the effect of making all contracts depend for their validity upon the existence of some consideration.

The rule that a simple contract requires a consideration has three distinct sources. These are the action of debt and the action of assumpsit in the common law courts, and the peculiar doctrines governing the courts

<sup>1</sup> N. Y. Code, § 840; *Wilbur v. Warren*, 104 N. Y. 192.

of equity in their administration of equitable relief. In the action of debt, as we have seen, a *quid pro quo* was necessary in all cases where the debt was not proved by a record or by a charter. This *quid pro quo* was the benefit conferred upon the defendant by the plaintiff at the time of the creation of the debt and was in fact the cause of the debt, which was regarded as arising rather from the receipt of the benefit than from the promise to pay for it. In this respect debt resembled the contract *re* of the Roman law, in which the transfer of property gave rise to an obligation. Consideration, as the *quid pro quo* came to be termed, always meant in the action of debt a benefit conferred by the plaintiff upon the defendant.

In the action of assumpsit we find an entirely different idea of consideration. The chief root of the modern action of special assumpsit, as we have seen, was the action on the case for deceit. In this action the plaintiff alleged that the defendant had made him a promise or representation, intending to deceive him, and that, relying on that promise or representation, he, the plaintiff, had incurred some detriment. Originally this detriment meant parting with money or property, or performing services; but it was finally extended to cases where the only detriment incurred by the plaintiff consisted in the fact that he had bound himself to the defendant by mutual promises.

In *indebitatus assumpsit*, the antecedent debt was treated as a sufficient consideration to support the promise to pay it. When the promise, however, came to be held unnecessary, *indebitatus assumpsit* lost its original character as a true contractual action, and stood practically on the same footing as debt.

In equity peculiar doctrines of consideration prevailed. Two kinds of consideration were here recog-

nized, — good consideration, which meant relationship within certain degrees of consanguinity, and valuable consideration, which was the consideration recognized in the common law courts, and meant some benefit to the promisor or some detriment to the promisee. A court of equity would never enforce a contract unless there were a good or valuable consideration therefor; while the common law courts knew nothing of good consideration, and did not require any consideration for contracts under seal. The equitable doctrine of consideration somewhat resembled the Roman law theory of *causa*,<sup>1</sup> by which the chancellors may have been influenced. *Causa*, like consideration in equity, meant a sufficient legal reason for enforcing a promise, without which a promise was called *nudum pactum*. What is such a sufficient reason is a question of positive law. Liberality in the Roman law was a sufficient *causa*, as relationship was a good consideration in equity for a covenant to stand seised to the use of another. Good consideration in equity, however, did not make a contract binding which was not binding at law; it merely rendered a covenant to stand seised enforceable by a court of equity, which would raise a use upon such a covenant only where there was such consideration.

It was not until 1778 that the requirement of consideration for simple contracts was definitely established. Previous to that time Lord Mansfield had held that a promise in writing was binding without consideration, saying that the ancient notion about the want of consideration was for the sake of the evidence only, and did not apply to promises in writing.<sup>2</sup> In *Rann v. Hughes*,<sup>3</sup> however, the House of Lords overruled Lord

<sup>1</sup> Langdell, 1 Harv. Law Rev. 367.

<sup>2</sup> Pillans v. Van Mierop, 3 Burrow. 1663; L. 177.

<sup>3</sup> 7 T. R. 350, note a; L. 187.



Mansfield's decision, holding that all contracts were either by specialty or by parol, and that for all promises not under seal a consideration was necessary.

Consideration, which is now used to mean valuable consideration only, is of two kinds, one antecedent, the other subsequent to the promise which it supports. Any pecuniary obligation will suffice for an antecedent consideration. Consideration is more commonly used, however, to denote subsequent consideration only, and it will be used in that sense hereafter unless otherwise specified.

(b) *Definitions and Instances of Consideration.* — Consideration has been defined as a benefit to the promisor or a detriment to the promisee. What connection is there between benefit to the promisor and detriment to the promisee that gives rise to such a definition in the alternative? The answer to this is found in the two common law sources of the doctrine of consideration, the action of debt and the action of assumpsit. The *quid pro quo* in debt was a benefit to the debtor, while the origin of the defendant's liability in assumpsit was that the plaintiff had been induced to act in reliance upon his promise. The consideration of assumpsit, or the detriment to the promisee, is the consideration upon which our modern theories of simple contracts are based.

The "detriment to the promisee" which constitutes a consideration, is not necessarily a detriment at all; it is simply the surrender of a legal right. So long as a legal right is surrendered, there is a sufficient consideration, although the surrender of that right may be of no value to the other party, and may actually benefit the party surrendering such right. The following examples will show what an infinite variety of things may constitute a consideration.

The surrender of a document is a sufficient consideration, though that document be a written instrument of no legal value.<sup>1</sup> The holder of the document is under no legal obligation to part with it; hence his parting with it is a surrender of his legal right to keep it.

Permission by the promisor to weigh certain boilers belonging to the promisee is a sufficient consideration for a promise, the surrender of possession by the promisee being the surrender of a legal right.<sup>2</sup>

The execution of a release of land to which the promisee has no title is a sufficient consideration; the promisee is not bound to execute the release.<sup>3</sup>

The naming of the promisee's child after the promisor is a sufficient consideration, the promisee having the right to give the child any name.<sup>4</sup>

A promise to pay a sum claimed to be due by one party, and denied by the other, if the claimant will swear to the correctness of the claim, is binding if the promisee takes the required oath, since he is under no legal obligation to do so.<sup>5</sup>

It is of no consequence that the promisee is benefited by the act that constitutes the consideration. Thus, where the defendant's testator promised the plaintiff to pay the plaintiff's expenses if he would take a trip to Europe, the incurring of the expense of such a trip was held a sufficient consideration for the promise.<sup>6</sup>

So a promise to pay another a certain sum of money if he will abstain from the use of liquor and tobacco for a given time is binding in favor of the party who so

<sup>1</sup> *Haigh v. Brooks*, 10 A. & E. 323; L. 210; *Judy v. Louderman*, 29 N. E. 181; 48 Ohio, 562.

<sup>2</sup> *Bainbridge v. Firmstone*, 8 A. & E. 743; L. 209.

<sup>3</sup> *Sykes v. Chadwick*, 18 Wall. 141.

<sup>4</sup> *Wolford v. Powers*, 85 Ind. 294.

<sup>5</sup> *Brooks v. Ball*, 18 Johns. 237; L. 200.

<sup>6</sup> *Devemon v. Shaw*, 69 Md. 199; 14 A. 464; W. 547; H. & W. 141.

abstains.<sup>1</sup> A man has a legal right to use liquor and tobacco, and his abstinence amounts to a surrender of that right.

The surrender by a mother of her illegitimate child is a good consideration for a promise by the father to support the child.<sup>2</sup>

A promise to come to the promisor's funeral is a sufficient consideration to support a promise.<sup>3</sup>

A most interesting question as to the sufficiency of consideration arose in *Carlill v. Carbolic Smoke Ball Co.*<sup>4</sup> In that case the defendants, proprietors of a "Carbolic Smoke Ball," advertised in a newspaper, offering a reward of £100 to any person who should contract influenza after having used the ball for two weeks. The plaintiff read the advertisement, and bought one of the balls, and after using the ball in the prescribed manner contracted influenza; whereupon she sued the defendants, and recovered the amount of the award. The court held that her performance of the conditions of the advertisement was a sufficient consideration for the defendants' promise to pay the £100.

(c) *Mutual Promises*. — To incur a legal obligation is, of course, to surrender a legal right to act freely in respect to the subject matter of an obligation. A promise to do an act will therefore be a consideration whenever the doing of the act would be. The rule that mutual promises are the consideration for each other

<sup>1</sup> *Hamer v. Sidway*, 124 N. Y. 538; 27 N. E. 256; H. & W. 143; *Lindell v. Rokes*, 60 Mo. 249; *Talbott v. Stemmons*, 89 Ky. 222; 12 S. W. 297.

<sup>2</sup> *Benge v. Hiatt*, 82 Ky. 366; *contra*, *Wallace v. Rappleye*, 103 Ill. 229, on the ground that the mother was benefited by such surrender.

<sup>3</sup> *Earle v. Angell*, 157 Mass. 294; 32 N. E. 164.

<sup>4</sup> (1893) 1 Q. B. 256.

has been recognized since 1555.<sup>1</sup> When the consideration is a promise, it is called executory; when the consideration is an act performed, it is said to be executed. It is always important to keep in mind the fact that where the consideration is executory it is the promise, and not the performance, that constitutes the consideration and makes the contract binding. This elementary proposition has sometimes been lost sight of by the courts. Where the consideration is executed, the contract is always unilateral; where the consideration is executory, the contract is bilateral, provided the promises are mutual.

In order that a promise should constitute a consideration, it must impose some legal liability on the party making it. Therefore, a married woman's promise, being void at common law, would constitute no consideration.<sup>2</sup> It is not necessary, however, that the liability imposed should be perfect. Thus, an infant's promise is a good consideration for an adult's,<sup>3</sup> although the infant's promise is voidable. So an oral promise within the Statute of Frauds is a good consideration for a promise in writing.<sup>4</sup>

(d) *Distinction between Consideration and Condition Precedent.* — An act may or may not be a consideration as the parties do or do not treat it as such. In the case of a bailment for the benefit of the bailor it is said that the delivery of possession of the property is the consideration for the bailee's promise to take care of the goods.<sup>5</sup> It has been pointed out, however, by Mr.

<sup>1</sup> Ames, 8 Harv. Law Rev. 259; Pecke v. Redman, Dyer, 113 a.

<sup>2</sup> Warner v. Crouch, 14 Allen, 163.

<sup>3</sup> Holt v. Ward Clarendieux, 2 Strange, 937; L. 397; Baldwin v. Van Deusen, 37 N. Y. 487.

<sup>4</sup> Justice v. Lang, 42 N. Y. 493.

<sup>5</sup> Hart v. Miles, 4 C. B. N. S. 371; L. 391; where the plaintiff's con-

Justice Holmes,<sup>1</sup> that, although the delivery of possession may be a consideration, it will not necessarily be one; and that the delivery of possession can only be regarded as a consideration when it is so treated by the parties. In case the bailee accepts the charge of the goods simply as a matter of favor to the bailor, the delivery of possession is no consideration, but a mere condition precedent to the performance of the promise.

(e) *Adequacy of Consideration.* — The adequacy of the consideration has nothing to do with the validity of the contract.<sup>2</sup> The fact that the consideration is of less value than that which the promisor is to give for it is, in itself, of no consequence. The promisor has the absolute right to determine upon what consideration he will consent to be bound; but when he has designated the consideration, he is bound by his act, regardless of his wisdom or folly in making a bargain. But though inadequacy of consideration does not affect the validity of a contract, such inadequacy may be one element in the unfair dealing for which a court of equity may set the contract aside.

The consideration, however inadequate, must nevertheless be real. That is to say, there must really be an act or promise which is regarded by the parties as a true consideration. If the consideration is merely colorable, it will be disregarded by the courts. Thus one cent has been held an insufficient consideration for a promise to pay \$700;<sup>3</sup> and \$1 insufficient to support a promise to pay \$1,000.<sup>4</sup> In both these cases the consideration sent to the retention by the defendant of two bills of exchange was held a good consideration.

<sup>1</sup> Common Law, 291, 292.

<sup>2</sup> *Lawrence v. McCalmont*, 2 How. 426; *Haigh v. Brooks*, 10 A. & E. 323; L. 210.

<sup>3</sup> *Schnell v. Nell*, 17 Ind. 29; H. & W. 138.

<sup>4</sup> *Shepard v. Rhodes*, 7 R. I. 470.

was regarded by the courts as merely colorable. Yet a promise to pay \$1,000 for a particular dollar of great rarity is unquestionably binding, the dollar in such case being a real consideration for the promise to pay. And, *vice versa*, \$1 is a good consideration, it seems, for any promise except a promise to pay a larger sum of money absolutely.<sup>1</sup>

(f) *Contingent Consideration*. — Incurring a legal obligation is a good consideration, even though that obligation be contingent. If a man promises to act in a certain way upon the happening of a certain event, he thereby limits his freedom of action in case such event occurs. Thus, if A. promises B. to buy of him all articles of a certain kind which A. may require in his business for a given period, A.'s promise is a good consideration for B.'s promise to sell such articles at a certain price; for though A. may not require any of the articles during that period, still, if he does require any, he is bound to buy them of B., and he has therefore parted with his right to buy wherever he sees fit.<sup>2</sup> In regard to such indefinite agreements there has been some confusion of thought, but the principles governing such cases seem clear.

Where an offer is made to sell goods or render services at a fixed price, if the amount of goods or the quantity of service to be furnished is fixed, acceptance of the offer completes a contract. This contract is bilateral, consisting of mutual promises to buy and to sell. If the amount of goods or the quantity of service is not fixed, but is to be determined by some future event, does the offeree's saying, "I accept your offer," make a

<sup>1</sup> *Lawrence v. McCalmont*, 2 How. 426; *Dutchman v. Tooth*, 5 Bing. N. C. 577.

<sup>2</sup> *Smith v. Morse*, 20 La. Ann. 220; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *contra*, *Bailey v. Austrian*, 19 Minn. 535.

contract? This depends upon whether such an acceptance imposes any obligation on the acceptor. If such acceptance in no way limits the freedom of action of the acceptor, then there is no contract, because there is no consideration for the offerer's promise to sell the goods or to render the services.<sup>1</sup> Thus in *Chicago & Great Eastern Railway Co. v. Dane*,<sup>2</sup> the defendant offered to transport from New York to Chicago not exceeding 6,000 tons of iron at a fixed price during a given period. The plaintiff wrote "accepting" this offer; but the court held there was no contract, there being no consideration for the defendant's promise to transport the iron. The plaintiff's acceptance did not bind him to deliver for transportation any iron whatever, either absolutely or conditionally.

If, however, the acceptance binds the acceptor, though only conditionally, there is a binding contract, for there is then a consideration for the offerer's promise. For this reason, as just stated, if the offer is to sell all the goods the offeree may need in his business during a given period at a fixed price, acceptance by the offeree completes the contract. Such an agreement has been held not binding in Minnesota,<sup>3</sup> on the ground that the acceptor does not promise to order any goods; but this reasoning seems erroneous, because it ignores the fact that the acceptor parts with his right to buy goods of any one but the offerer.

Although an acceptance of an offer which does not bind the acceptor has no effect to bind the other party, an offer of an indefinite amount of goods at a fixed price is rendered binding by an acceptance of the offer as to a definite amount of the goods. Thus in *Great Northern*

<sup>1</sup> *Thayer v. Burchard*, 99 Mass. 508; *American Cotton Oil Co. v. Kirk*, 68 F. 791, — U. S. App. —.

<sup>2</sup> 43 N. Y. 240; W. 510.

<sup>3</sup> *Bailey v. Austrian*, *supra*.

*Railway Co. v. Witham*,<sup>1</sup> the defendant offered to supply the plaintiff with such quantities of stores as the plaintiff might order at prices named. The plaintiff wrote "accepting" this offer. Several orders for iron were given by the plaintiff and executed by the defendant; but at last the defendant refused to fill any more orders, and the plaintiff sued for breach of contract. Judgment was given for the plaintiff. The consideration in this case was not the "acceptance" of the defendant's offer by the plaintiff's letter, because such acceptance did not bind the acceptor in any way. The consideration was the actual sending of an order for a definite amount of the iron. "Accepting" the defendant's offer imposed no obligation on the plaintiff, while ordering a definite amount of iron bound the plaintiff to take and pay for the iron so ordered.

In *Cooper v. Lansing Wheel Co.*<sup>2</sup> the plaintiff sent the defendant an order for all the wheels "we may want during the season of 1890," at certain specified prices, and the defendant accepted the offer. The plaintiff gave certain orders, which were filled, but subsequent orders were not filled, and the plaintiff sued for breach of contract. The court held the plaintiff entitled to recover, but on grounds that are hardly tenable. The court said that the defendant could have withdrawn the offer to supply the goods at any time before the plaintiff had acted upon it by ordering goods. This seems erroneous, because the plaintiff's agreement to buy all the wheels he needed of the defendant was a good consideration for the defendant's promise to sell such wheels. The court went on to say, however, that, though the plaintiff's order and the defendant's acceptance did not constitute a contract, still, when the plain-

<sup>1</sup> L. R. 9 C. P. 16; W. 471.

<sup>2</sup> 54 N. W. 39; 94 Mich. 272; H. & W. 50.



tiff gave one order for wheels, the defendant thereupon became bound to deliver all other wheels the plaintiff might thereafter order. This seems erroneous also, for if the defendant is to be regarded as offering wheels for sale at such a price, the plaintiff's order of a certain number of wheels would turn such offer into a contract to deliver the wheels ordered, and not all wheels the plaintiff might order in the future. The Michigan court relied on the case of *Great Northern Railway Co. v. Witham*, in which the court merely held that one who offered an indefinite amount of goods for sale at a given price was bound by an order for a definite amount of goods, not that such order would turn the offer into a binding contract to fill all future orders. The facts in *Cooper v. Lansing Wheel Co.* were similar to those in *Great Northern Railway Co. v. Witham*, and the decision was therefore properly in favor of the plaintiff; but the reasoning of the court in the Michigan case is not supported by the English decision.

(g) *Performance of Legal Obligation*. — Consideration involves the surrender of a legal right, or the incurrance of a legal obligation. We have seen that the right surrendered or the obligation incurred may be very slight, but some right or obligation there must be. Accordingly, if the promisee does or promises to do only that which he is already bound to do, it is clear that there is no consideration for the promise of the other party. Illustrations of this principle are very numerous. Thus, it is no consideration to surrender property which the possessor has no right to retain.<sup>1</sup> Nor is the performance of his duty by a public officer a good consideration;<sup>2</sup> but the performance of extra services is of course sufficient.<sup>3</sup>

<sup>1</sup> *Tolhurst v. Powers*, 133 N. Y. 460; 31 N. E. 326; H. & W. 174.

<sup>2</sup> *Pool v. Boston*, 5 Cush. 219; *Smith v. Whildin*, 10 Pa. St. 39; H. & W. 176.

<sup>3</sup> *England v. Davidson*, 11 A. & E. 856; L. 220; *Reif v. Page*, 55

It is of no consequence whether the obligation imposed upon the promisee is a general duty, or is the result of his own contract; in neither case is the fulfilment or the promise to fulfil such obligation a good consideration. Thus, the prompt payment of rent or interest due on a contract is no consideration.<sup>1</sup> Nor is a promise by a debtor to pay interest at the same or at a less rate than his contract calls for a good consideration for a promise by the creditor to extend the time of payment.<sup>2</sup> If, however, the debtor agrees to pay interest for a fixed time after the debt is due, he thereby deprives himself of the right to pay the debt before that time, and thus stop the running of interest; so that a promise to pay interest for a fixed time at the same or even at a lower rate than the contract calls for is a good consideration.<sup>3</sup> This distinction between a promise to pay interest for a definite and for an indefinite time, though sound in principle, is not recognized by all courts.<sup>4</sup>

From the general principle that doing what one is bound to do is no consideration, it follows that the pay-

Wis. 496; 13 N. W. 473; *McCandless v. Allegheny Steel Co.*, 152 Pa. St. 139; 25 A. 579.

<sup>1</sup> *Booth v. Wiley*, 102 Ill. 84.

<sup>2</sup> *Wilson v. Powers*, 130 Mass. 127; *Kellogg v. Olmsted*, 25 N. Y. 189. In *Vereycken v. Vandenbrooks*, 102 Mich. 119, 60 N. W. 687, a note drew 10%, and the creditor agreed to let the debtor have the money after maturity at 8%, no time being fixed for the payment of this 8% interest. The court said that such an agreement "was binding when acted upon"; the retention of the money by the debtor being treated by the court as a consideration for the creditor's promise to reduce the interest. The opinion of the court on this point was mere dictum, but the dictum is so astonishing as to be worthy of notice.

<sup>3</sup> *Fowler v. Brooks*, 13 N. H. 240; *Fawcett v. Freshwater*, 31 Ohio St. 637.

<sup>4</sup> *Wilson v. Powers*, *supra*; *Kellogg v. Olmsted*, *supra*.

ment of part of a debt already due is no consideration for a promise to release the balance of the debt.<sup>1</sup> But payment of a less sum before the debt is due,<sup>2</sup> or at a different place from that where the debtor is bound to pay,<sup>3</sup> is a good consideration. So is the giving of a specific article,<sup>4</sup> or of a negotiable security for a less amount than the debt,<sup>5</sup> or of any other security.<sup>6</sup>

(1) EFFECT OF UNCERTAINTY AS TO ONE'S RIGHTS. — If there is no debt, but an unliquidated sum due, payment of less than the amount claimed is a good consideration.<sup>7</sup> In such cases the uncertainty as to the exact rights of the parties renders the payment of a certain amount a sufficient consideration. Indeed, it may be laid down as a general principle, that wherever two parties are uncertain as to their rights in a given matter, an agreement for a definite settlement is binding, the consideration on both sides being the exchange of an uncertainty for a certainty.<sup>8</sup> This general principle has been subjected to certain limitations which will soon be considered. In accord with this principle it has been held that where a tract of land is sold by metes and bounds, as containing a certain number of acres, a subsequent agreement between grantor and

<sup>1</sup> *Foakes v. Beer*, 9 A. C. 605; W. 335; *U. S. v. Bostwick*, 94 U. S. 53, 67; *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 577; 12 S. Ct. 84; *Harriman v. Harriman*, 12 Gray, 341. In some States this rule is changed by statute.

<sup>2</sup> *Brooks v. White*, 2 Met. 283; *Pinnel's Case*, 5 Rep. 117.

<sup>3</sup> *Jones v. Perkins*, 29 Miss. 139.

<sup>4</sup> *Brassell v. Williams*, 51 Ala. 349.

<sup>5</sup> *Sibree v. Tripp*, 15 M. & W. 23; *Boyd v. Hitchcock*, 20 Johns. 76; *Guild v. Butler*, 127 Mass. 386.

<sup>6</sup> *Jaffray v. Davis*, 124 N. Y. 164; 26 N. E. 351; H. & W. 187.

<sup>7</sup> *Wilkinson v. Byers*, 1 A. & E. 106; L. 203; *Tompkins v. Hill*, 145 Mass. 379; 14 N. E. 177; *Donohue v. Woodbury*, 6 Cush. 148; *Baird v. U. S.*, 96 U. S. 430.

<sup>8</sup> *Good Fellows v. Campbell*, 17 R. I. 402; 22 A. 307.

grantee that the land shall be surveyed, and that in case the actual amount of land exceeds that mentioned in the deed the grantee shall pay the grantor so much per acre for the excess, while in case of a deficiency the grantor shall pay the grantee so much per acre for the deficiency, is binding.<sup>1</sup> The grantor's promise to pay for the possible deficiency is the consideration for the grantee's promise to pay for the excess, and *vice versa*. If, however, one of the parties knew the exact amount of land, and knew that he would not be obliged to pay anything under such an agreement, his promise would be without consideration, because there could be no uncertainty on his part, and therefore his promise could not possibly be regarded as a legal detriment. Uncertainty in regard to existing facts, on the other hand, is treated on the same basis as uncertainty in regard to the future. The assumption of a risk is a good consideration, and a risk may just as truly be assumed with reference to an unknown fact in the present or past as with reference to an uncertain event in the future. Indeed, if one accepts the theory of predestination, the future is as certain as the past, and what we call uncertainty is in all cases simply lack of knowledge.

It would seem as if this reasoning might be universally applied, so that the surrender of a supposed legal right in regard to the existence of which the party surrendering it is uncertain would in any case constitute a good consideration. The courts, however, have not always carried out the general principle above stated to its full extent. The question of consideration often arises in the case of a compromise of a disputed claim, and the authorities are not in harmony. The English courts hold that the abandonment of a serious claim honestly made is a good consideration; and a claim is said to be

<sup>1</sup> *Seward v. Mitchell*, 1 Coldwell, 87; W. 554.

honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which show that his claim is a bad one.<sup>1</sup> This is on the ground that, if an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he thereby gives up something of value; and that "the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession."<sup>2</sup> The same principle applies to cases where there is a forbearance to sue on a *bona fide* claim.<sup>3</sup> The doctrine of the English cases seems sound, and there is strong American authority to the same effect.<sup>4</sup> Other American decisions hold that forbearance to insist upon a claim is a good consideration only when the claim is valid,<sup>5</sup> or at least when the claim seems doubtful to the court.<sup>6</sup> The real question involved in such cases is this: Has a man a right to litigate a claim which he honestly believes to be good, or only a claim which a reasonable man might honestly believe to be good? It is the surrender of this right to

<sup>1</sup> *Miles v. New Zealand Alford Estate Co.*, 32 C. D. 266; W. 556; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; L. 281; *Cook v. Wright*, 1 B. & S. 559; L. 308.

<sup>2</sup> Bowen, L. J., in *Miles v. New Zealand Co.*, *supra*, at p. 291.

<sup>3</sup> *Callisher v. Bischoffsheim*, *supra*.

<sup>4</sup> *Craus v. Hunter*, 28 N. Y. 389; *Union Bank v. Geary*, 5 Pet. 99; *Grandin v. Grandin*, 49 N. J. L. 508; 9 A. 756; *Hewett v. Currier*, 63 Wis. 386; 23 N. W. 884; *Parker v. Enslow*, 102 Ill. 272; *Llano Improvement Co. v. Pacific Imp. Co.*, 66 F. 526; — U. S. App. —.

<sup>5</sup> *Ecker v. McAllister*, 54 Md. 362; *Palfrey v. Portland, &c. Ry. Co.*, 4 Allen, 55; *Foster v. Metts*, 55 Miss. 77; H. & W. 164; *Fink v. Smith*, 32 A. 566; — Pa. St. —.

<sup>6</sup> *Barlow v. Ocean Ins. Co.*, 4 Met. 270; *Tuttle v. Tuttle*, 12 Met. 551; *Mulholland v. Bartlett*, 94 Ill. 58.

litigate which constitutes the consideration, and by the extent of that right to litigate is to be determined the question whether or not his abandonment of or forbearance to prosecute his claim is or is not a good consideration.<sup>1</sup>

The actual forbearance, or a promise to forbear to prosecute a claim which one has a right to litigate, is universally held a good consideration. Nor need a promise to forbear to sue state a definite time for forbearance, a reasonable time being understood in such cases.<sup>2</sup> But a promise to forbear for such time as the plaintiff shall elect is not a good consideration, since it imposes no obligation to forbear for any length of time.<sup>3</sup> Actual forbearance is a sufficient consideration without a promise to forbear, if such forbearance be at the request of the promisor and in reliance on his promise.<sup>4</sup> The mere withdrawal of a petition<sup>5</sup> or a caveat<sup>6</sup> is like-

<sup>1</sup> In *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, at p. 577, Brown, J. says: "If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim; but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void." The distinction between good faith ("a *bona fide* dispute") and reasonable conduct ("no good reason to doubt") seems here, as in many other cases, to be entirely overlooked. Yet such distinction is of the utmost importance, for honesty and reasonableness are by no means inseparable.

<sup>2</sup> *Traders' Nat. Bk. v. Parker*, 130 N. Y. 415; 29 N. E. 1094; *Howe v. Taggart*, 133 Mass. 284; *Hockenbury v. Meyer*, 34 N. J. L. 346; *Elting v. Vanderlyn*, 4 Johns. 237.

<sup>3</sup> *Strong v. Sheffield*, 144 N. Y. 392; 39 N. E. 330.

<sup>4</sup> *Edgerton v. Weaver*, 105 Ill. 43; *Crears v. Hunter*, 19 Q. B. D. 341; *contra*, *Manter v. Churchill*, 127 Mass. 31.

<sup>5</sup> *Harris v. Venables*, L. R. 7 Ex. 235; disapproving *Ross v. Moss*, Cro. Eliz. 560.

<sup>6</sup> *St. Mark's Church v. Teed*, 120 N. Y. 583; 24 N. E. 1014.

wise a sufficient consideration, even though a new suit may be begun at once.

(2) PERFORMANCE OF BROKEN CONTRACT. — There are certain cases that may seem inconsistent with the rule that doing what one is bound to do is not a sufficient consideration. Thus, it has been held that, if A. is bound by a contract with B. to build a house for \$5,000, and A. refuses to complete the house unless B. will agree to pay him \$1,000 extra, a promise by B. to pay A. this extra \$1,000 is binding. The courts which sustain the validity of B.'s promise reason as follows. A. is under no legal obligation to perform his contract; he has the right to break it if he chooses, and pay damages; hence, if A. consents to perform his contract instead of paying damages, he is doing something which he is not legally bound to do, and there is therefore a sufficient consideration for B.'s promise.<sup>1</sup> Other courts take the position that A. is legally bound to perform his contract, and that there is therefore no consideration for B.'s promise to give him additional compensation.<sup>2</sup> The latter view seems more in accordance with justice, and with the equitable theory of contractual obligation; but the former view has the support of those who, like Mr. Justice Holmes, regard the making of a contract as the mere taking of a risk.<sup>3</sup>

Even in those jurisdictions where a promise to perform what the promisor had bound himself to do by a previous contract is held a good consideration, it is generally held that the promise to pay additional compensation for

<sup>1</sup> *Cooke v. Murphy*, 70 Ill. 96; *Bishop v. Busse*, 69 Ill. 403; *Goebel v. Linn*, 47 Mich. 489; 11 N. W. 284; W. 308; *Munroe v. Perkins*, 9 Pick. 298; W. 302; *Lattimore v. Harsen*, 14 Johns. 330.

<sup>2</sup> *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578; 15 S. W. 844; H. & W. 181.

<sup>3</sup> *Post*, Chapter XI.

such performance is binding only when the transaction amounts to the substitution of a new contract for the old one.<sup>1</sup> Whether there has been such a substitution or not is a question for the jury.<sup>2</sup>

A peculiar doctrine has recently been enunciated in Minnesota. The court adopts the view that the obligation imposed by a contract is an obligation to perform the contract, and not merely to pay damages; that the party who performs his contract is simply doing what he is legally bound to do, and that there is therefore no consideration for a promise by the other party to pay additional compensation for such performance. So far the court seems right in its decision, although it refuses to follow the majority of American courts. The court goes on, however, to say, "But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration."<sup>3</sup> The fallacy here is apparent. "An additional burden not contemplated by the parties" cannot mean any increased difficulty in the performance of the contract, for the "burden contemplated by the parties" is that one person shall perform his part of the contract, and the other shall pay him for

<sup>1</sup> *Munroe v. Perkins*, *supra*; *Endriss v. Belle Isle Ice Co.*, 49 Mich. 279; 13 N. W. 590; W. 310; H. & W. 180; *Vanderbilt v. Schreyer*, *supra*; *contra*, *Cooke v. Murphy*, 70 Ill. 96.

<sup>2</sup> *Endriss v. Belle Isle Ice Co.*, *supra*; *Coyner v. Lynde*, 10 Ind. 282; H. & W. 177.

<sup>3</sup> *King v. Duluth M. & N. Ry. Co.*, 63 N. W. 1105; — Minn. —.



it.<sup>1</sup> To hold, for example, that an unexpected increase in the price of bricks will render valid a promise by A. to B. to pay B. \$6,000 for building a house, when such promise would not be binding if the price of bricks had remained stationary, by reason of a pre-existing contract on B.'s part to build the house for \$5,000, is to overthrow any logical theory of contractual obligation. Such a proposition can rest only on the notion that unexpected difficulties in the performance of a contract alter the obligation to perform that contract, ignoring the fact that the object of the contract is to throw *all* such risks on the party who promises to perform.

The result of the decisions enforcing promises to pay additional compensation for the same performance is certainly a curious one. The courts hold that the promise to pay an additional amount for the performance of work which the promisee has bound himself to perform by a previous contract is not binding for lack of consideration, unless such promise forms part of a new contract. If there is a new contract, the promise of performance by the one party is the consideration for the promise of payment by the other. Now if we regard a contract as imposing an obligation to perform, and not simply to pay damages in case of non-performance, the obligation to perform still exists under the old contract, until the old contract is discharged. The discharge of the old contract, however, is supposed to take place by the substitution of a new contract; but the new agreement is no contract, because the only consideration for A.'s promise to pay is B.'s promise to perform, and B. is already bound to perform under the old contract. On the other hand, if B.'s obligation is only to pay damages in case he fails to perform his contract, then his second promise of performance can impose no

<sup>1</sup> See *Leavitt v. Dover*, 32 A. 156; — N. H. —.

greater obligation than his first, so that even this view does not justify one in regarding the new agreement as a contract.

The situation may be illustrated as follows: —

FIRST AGREEMENT.

A.'s promise to pay	in consideration of (B.'s promise to perform)	B.'s obligation to perform.
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SECOND AGREEMENT.

A.'s promise to pay additional com- pensation	in consideration of (B.'s promise to perform)	B.'s obligation to perform.
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In this case it is clear that there is no change in B.'s obligation between the first and second agreements, and therefore no consideration for A.'s second promise.

Or, taking the other view of B.'s obligation, we have: —

FIRST AGREEMENT.

A.'s promise to pay	in consideration of (B.'s promise to perform)	B.'s obligation to pay damages in case of non-per- formance.
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SECOND AGREEMENT.

A.'s promise to pay additional com- pensation	in consideration of (B.'s promise to perform)	B.'s obligation to pay damages in case of non-per- formance.
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So that, whatever view is taken of the obligation of contract, the decisions upholding the validity of A.'s

promise to pay an additional amount for B.'s performance seem unsound.<sup>1</sup>

(3) PERFORMANCE OF CONTRACT WITH THIRD PERSON.

— Whether a promise by A. to B. to perform a contract already existing between A. and C. is a good consideration or not, is a question upon which the authorities are divided. The English courts treat such a promise as a good consideration,<sup>2</sup> while the American courts,<sup>3</sup> with the exception of the Supreme Court of Massachusetts,<sup>4</sup> adhere to the opposite view. Various views on this point have been advanced by learned writers, and there is no consensus of opinion as to the validity of such contracts. It is true, of course, that a promise to perform, or the actual performance of, a legal obligation is, in general, not a valid consideration; but there seems to be no satisfactory reason why this rule should not be limited to cases where the obligation is irrecusable, or is to the promisor, or to the public of whom the promisor is one. The rule might then be thus stated: a promise to perform, or actual performance of, an irrecusable obligation, or an obligation to the public or to the promisor, is not a valid consideration.

A brief mention of some of the views taken by different writers will show the wide diversity of opinion. Professor Langdell maintains that a promise to perform a contract with a third party is a good consideration, although actual performance would not be, on

<sup>1</sup> Professor Williston agrees with the views here advanced, though he admits, as does the author, that the weight of American authority is opposed to them. See 8 Harv. Law Rev. 27.

<sup>2</sup> *Shadwell v. Shadwell*, 9 C. B. N. S. 159; L. 233; *Scotson v. Pegg*, 6 H. & N. 295; L. 240.

<sup>3</sup> *Johnson v. Sellers*, 33 Ala. 265; H. & W. 185; *Davenport v. First Congregational Society*, 33 Wis. 387; *Putnam v. Woodbury*, 68 Me. 58; and see Professor Williston's article in 8 Harv. Law Rev. 27.

<sup>4</sup> *Abbott v. Doane*, 163 Mass. 433; 40 N. E. 197.

the ground that such promise gives a right of action against the promisor, which constitutes a legal detriment.<sup>1</sup> This distinction between unilateral and bilateral contracts has been attacked by Sir William Anson,<sup>2</sup> and by Professor Williston,<sup>3</sup> and seems to have no support either in England or America, with the exception of one case.<sup>4</sup>

Sir William Anson at one time attempted to support the English doctrine by treating the consideration in such cases as the promise by A. to B. to abandon his right to induce C. to release him from the existing contract.<sup>5</sup> Professor Williston attacks this view on two grounds: first, because it can apply only to cases where B. is aware of A.'s contract with C.; and secondly, because it is of no consequence to B. whether C. releases A. or not, so long as A. actually performs his agreement. Both these criticisms seem just; and Sir William Anson now takes the ground that there is no consideration in such cases.<sup>6</sup>

Professor Williston goes further, however, and adopts the doctrine of most American courts, that A.'s promise to B. to perform his contract with C., or the actual performance of such contract, is not a good consideration for a promise by B. The effect of this reasoning is, of course, to prevent B. from acquiring any security that A. will perform his contract with C., no matter how much B. may be interested in securing such performance by A. True, A. can give B. his covenant to perform; but even this would be insufficient to give B. any rights in those States where seals are abolished, and all con-

<sup>1</sup> Summary, § 84.

<sup>2</sup> Contracts (4th ed.), 88.

<sup>3</sup> 8 Harv. Law Rev. 27.

<sup>4</sup> *Merrick v. Giddings*, 1 Mack. (D. C.) 394.

<sup>5</sup> Contracts (4th ed.), 88.

<sup>6</sup> *Ibid.* (8th ed.), 92.

tracts require consideration. The effect of holding that a promise by A. to B. to perform a public duty is no consideration, is to prevent A. from extorting money for the performance of his duties. To hold that a promise by A. to B. to perform an existing contract with B. is no consideration, is to enforce the maxim *pacta sunt servanda*. But to say that A. and B. cannot make a binding agreement that A. shall perform his contract with C., and that B. shall pay A. in consideration of A.'s promise or performance, seems to produce no desirable results. The sole reason for such a conclusion seems to be that it necessarily follows from the statement that performance of a legal obligation is no consideration. This broad statement must rest either on principle or on authority. On principle it seems too broadly stated, for the reasons just given. The authorities, however, are, as has been seen, divided. The latest judicial utterance on this point is by no means satisfactory. The Supreme Court, of Massachusetts has recently delivered itself as follows: "If A. has refused or hesitated to perform an agreement with B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement, in consequence of such request and promise by C., is a good consideration to support C.'s promise."<sup>1</sup> This statement of the law makes the question of consideration depend upon the benefit to the promisor, which in the case of an ordinary contract is manifestly unsound. Moreover, the court does not make it clear whether it is A.'s promise, or his performance, which constitutes the consideration for C.'s promise; while it would seem from the language used that A.'s conduct in refusing or

<sup>1</sup> *Abbott v. Doane*, 163 Mass. 433; 40 N. E. 197.

hesitating to perform his contract with B. is an essential element in the case.

(h) *Composition with Creditors.* — Two special kinds of contracts involve difficult questions in regard to consideration. These are compositions with creditors, and subscription papers. A promise by a creditor to accept part of a debt in satisfaction of the whole is, as we have seen, not binding; but when several creditors join in an agreement with their debtor to accept part payment in satisfaction of the whole, such a composition is binding. The reasons given by the courts for holding such compositions binding are hardly satisfactory. According to the language used by Parke, J., in the leading English case of *Good v. Cheesman*,<sup>1</sup> the consideration of each creditor's promise to release the debtor is the forbearance by all the other creditors who are parties to insist upon their claims. The same view has been taken in Massachusetts.<sup>2</sup> Now it is perfectly clear that a promise by A. to B. to accept one half of his claim against C. in full satisfaction of the debt, in consideration that B. will do the same with his claim, is a binding contract between A. and B., the two creditors. It is an elementary principle of the common law, however, that a man who is not a party to a contract has no rights by virtue of that contract. To allow the debtor to take advantage of such an agreement between his creditors is therefore to violate this fundamental principle; yet that is what the courts seem to do. The consideration for the creditor's promise to the debtor cannot be the payment of a part of the debt, because the debtor is bound to pay the whole; nor can it be the promise of another creditor, because the consideration must move from the debtor in order that a contract between

<sup>1</sup> 2 R. & Ad. 328; W. 320.

<sup>2</sup> *Perkins v. Lockwood*, 100 Mass. 249; H. & W. 197.

creditor and debtor may exist. The real consideration on the part of the debtor may be regarded as consisting either in his procuring the assent of the other creditors to the composition, or in his agreeing to treat them all on an equal footing.

(i) *Subscription Papers.* — As to the consideration which makes subscription papers enforceable, there has been some difference of opinion. It is now generally conceded, however, that the subscription amounts to an offer to pay the amount named to the person to whom the subscription is addressed, and that the promisee can enforce the subscription whenever he has acted upon it in the manner intended by the subscriber, and has thereby parted with some legal right or incurred some legal liability.<sup>1</sup> In case the subscription is addressed to a person who is to receive and expend the money for a given object, it is held by some courts that his acceptance of the subscription paper imposes on him a legal liability to apply the money in accordance with the terms of the subscription, and that the subscription is therefore binding when thus accepted.<sup>2</sup> Where the subscription is made upon some specified consideration, it is of course binding whenever that consideration is furnished by the promisee;<sup>3</sup> but where there is no specific consideration, the subscription is enforceable only to the extent that expenses and liabilities have been actually incurred on the faith of it.<sup>4</sup> In the former case, the subscrip-

<sup>1</sup> *Roberts v. Cobb*, 103 N. Y. 600, 9 N. E. 500; *Schuler v. Myton*, 48 Kans. 282; 29 P. 163; W. 549.

<sup>2</sup> *Ladies' Collegiate Inst. v. French*, 16 Gray, 196, 201; *Trustees v. Haskell*, 73 Me. 140; *contra*, *Johnson v. Otterbein University*, 41 Ohio St. 527; *Presbyterian Church v. Cooper*, 112 N. Y. 517; 20 N. E. 352; W. 544.

<sup>3</sup> *Roberts v. Cobb*, *supra*.

<sup>4</sup> *In re Hudson*, 54 L. J. Ch. 811.

tion constitutes a contract to pay the amount subscribed when the consideration is furnished; in the latter case, it amounts only to a promise to pay for services rendered or expenses incurred at the subscriber's request.

There are cases holding that the consideration which makes a subscription paper binding consists of the promises of the other subscribers, mutual promises being the consideration for each other. Unquestionably, if A. subscribes \$100 to the building of a church, in consideration that B. will subscribe an equal amount, and B. does so subscribe, there is a binding contract between A. and B. by which each is bound to pay \$100 to the church. The promises of A. and B. are made in consideration of each other, and are really mutual. In such a case the only difficulty arises when the church seeks to enforce the subscription. Being "a stranger to the consideration," as the phrase goes, the church cannot recover on the subscription where the common law doctrine prevails; and although the common law has been modified in many States so that the beneficiary of a contract may sue upon it, the right of the beneficiary of a subscription paper to enforce the subscription has been denied even by the court which has most widely departed from the rule that the consideration must move from the plaintiff.<sup>1</sup> The theory that a subscription paper is a contract consisting of mutual promises has, moreover, been misapplied in some cases;<sup>2</sup> for the mere fact that A., B., and C. all sign the same subscription paper does not necessarily make their promises in any sense mutual; and unless two promises are given in con-

<sup>1</sup> *Presbyterian Church v. Cooper*, 112 N. Y. 517; 20 N. E. 352; W. 544.

<sup>2</sup> *Higert v. Trustees*, 53 Ind. 236; *Allen v. Duffie*, 43 Mich. 1; 4 N. W. 427; *Lathrop v. Knapp*, 27 Wis. 214.



sideration of each other, they do not constitute a contract.<sup>1</sup>

A subscription to the stock of a corporation not yet organized is an offer to the corporation, and may be withdrawn at any time before the corporation is organized.<sup>2</sup>

(j) *Consideration must be furnished in Reliance on the Promise.* — With the exceptions hereafter to be noted, the consideration must be an act done in reliance on the promise. Hence, a person who furnishes information for which a reward is offered, in ignorance of the offer, cannot claim the reward.<sup>3</sup> But if the information is furnished with knowledge of the offer, the motive of the party furnishing it does not in any way affect his right to recover.<sup>4</sup>

The reason for the rule that the consideration must be furnished in reliance on the promise is found in the development of the action of assumpsit from the action on the case for deceit. It has always been necessary in deceit to allege and prove that the plaintiff acted in reliance upon the defendant's representations; and the origin of assumpsit in the action of deceit for breach of a parol promise sufficiently explains this very important rule in regard to consideration. The exceptions to the rule may be briefly stated.

(1) **MUTUAL PROMISES.** — Where a contract consists of mutual promises, each of the promises is the con-

<sup>1</sup> *Cottage St. Church v. Kendall*, 121 Mass. 528.

<sup>2</sup> *Hudson Real Estate Co. v. Tower*, 156 Mass. 82; 30 N. E. 465; s. c. 161 Mass. 10; 36 N. E. 680; *Bryant's Pond Co. v. Felt*, 32 A. 888; — Me. —.

<sup>3</sup> *Fitch v. Snedaker*, 38 N. Y. 248; H. & W. 62; L. 118; *contra*, *Dawkins v. Sappington*, 26 Ind. 190; H. & W. 65.

<sup>4</sup> *Williams v. Carwardine*, 4 B. & Ad. 621; L. 12. In *Gibbons v. Proctor*, 64 L. T. 594, the conditions of the offer were fulfilled after its

sideration for the other. To say that each promise is given in reliance upon the other would not seem to be stretching legal theory too far; yet it may seem simpler to the student to regard the case of mutual promises as an exception to the general rule. It will be remembered that in the early days of *assumpsit* an executory consideration was insufficient.

(2) **PRE-EXISTING OBLIGATION.** — An apparent exception to the rule that the consideration must be furnished in reliance on the promise is in the case where a promise is given in consideration of the receipt of a benefit which created at the time of its receipt some legal obligation, which may have been conditional, as in the case of an infant's contract,<sup>1</sup> or may have become barred by some positive provision of law, as by the statute of limitations,<sup>2</sup> or by the debtor's discharge in bankruptcy.<sup>3</sup> In such cases the promise is said to be made in consideration of the pre-existing obligation, and is treated as binding. The true theory, however, upon which such promises are treated as binding is, not that they create any contractual obligation, but that they amount to a waiver of a personal defence against an existing contract.<sup>4</sup> The action in such cases is on the original liability, and not on the subsequent promise.<sup>5</sup> It therefore follows, that, if the original liability has been absolutely destroyed, a subsequent promise to perform

publication, but it did not affirmatively appear that the plaintiff had seen the offer. This decision seems erroneous.

<sup>1</sup> *Williams v. Moor*, 11 M. & W. 256.

<sup>2</sup> *Isley v. Jewett*, 3 Met. 439; L. 380.

<sup>3</sup> *Shippey v. Henderson*, 14 Johns. 178; L. 368; *Dusenbury v. Hoyt*, 53 N. Y. 521; L. 387; H. & W. 208; *Way v. Sperry*, 6 Cush. 238; L. 384.

<sup>4</sup> *Shepard v. Rhodes*, 7 R. I. 470; H. & W. 210; *Isley v. Jewett*, *supra*; *Dusenbury v. Hoyt*, *supra*; *Way v. Sperry*, *supra*.

<sup>5</sup> See preceding cases.

the original contract is not binding. Thus, if a creditor voluntarily releases his debtor from the debt, a subsequent promise by the debtor to pay the debt is not binding, and will not revive the debt.<sup>1</sup> The distinction is between cases where the debt is discharged and where the debtor is merely entitled to a personal defence.

(3) *FLIGHT v. REED*. — An exception to the general rule was made in the case of *Flight v. Reed*,<sup>2</sup> where the court held that bills of exchange were binding, though given in renewals of other bills which were void. The original bills had been given for a loan which was usurious at the time by reason of a statute that had been repealed prior to the execution of the bills sued on. This case is a peculiar one, and seems to rest on the idea that usury laws are intended merely for the personal protection of the debtor, who may renounce the benefit of them.<sup>3</sup> It is clear that the consideration of a contract which is illegal at the time it is made will not in general support a promise made after the illegality has been removed.<sup>4</sup>

(4) *PAST CONSIDERATION*. — If the consideration for a promise is an act done before the making of the promise, the promise is not binding, since the consideration is not furnished in reliance on the promise. In the early stages of the action of *assumpsit*, when it was sought to substitute the new action for the action of debt on simple contract, it became customary to declare that the defendant, being indebted to the plaintiff, in consideration of that indebtedness promised to pay the debt to the plaintiff. When the promise in *indebitatus assumpsit* became a fiction, the real question at issue

<sup>1</sup> *Valentine v. Foster*, 1 Metc. 520; L. 374; *Shepard v. Rhodes*, *supra*.

<sup>2</sup> 1 H. & C. 703; L. 359.

<sup>3</sup> *Houser v. Planters' Bank*, 57 Ga. 95.

<sup>4</sup> *Ludlow v. Hardy*, 38 Mich. 690.

came to be the existence of a debt, and not the promise to pay it. From the fact that the consideration in such cases, to wit, the indebtedness, was alleged to have accrued before the promise, the idea naturally arose that an act performed at the defendant's request would support a subsequent promise.<sup>1</sup> It is now settled, however, that a pre-existing obligation will support only the promise to perform that obligation which the law, in the case of a debt, will imply;<sup>2</sup> and that a past consideration, which did not create an obligation at the time it was furnished, will support no promise whatever.<sup>3</sup> The modern Irish case of *Bradford v. Roulston*<sup>4</sup> maintains the ancient doctrine that a consideration executed at the defendant's request will support a subsequent promise, but this case does not represent the existing law.<sup>5</sup> A request for services, however, may be made under circumstances from which a promise to pay the value of those services may be inferred; in which case a subsequent promise to pay a definite sum may be evidence of the actual value of the services.

In one class of cases an executed consideration may be coupled with a promise, so as to impose contractual obligation on the promisor. Where A. renders services or pays money for B. without any request or authority from B., B. may subsequently ratify A.'s acts, and since by the law of agency, "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur*," B.'s ratification is treated

<sup>1</sup> *Marsh v. Rainsford*, 2 Leon. 111; L. 409; *Lampleigh v. Brathwait*, Hob. 105; L. 413; Langdell, Summary, §§ 90-94.

<sup>2</sup> *Hopkins v. Logan*, 5 M. & W. 241; L. 421; *Rann v. Hughes*, 7 T. R. 350, note a; L. 187.

<sup>3</sup> *Roscorla v. Thomas*, 3 Q. B. 234; L. 423; *Dearborn v. Bowman*, 3 Met. 155; L. 377; H. & W. 199; Langdell, Summary, § 93.

<sup>4</sup> 8 Ir. C. L. R. 468; L. 432.

<sup>5</sup> Anson, Contracts (8th ed.), 100; Pollock, Contracts, 170; Langdell, Summary, § 93.

as equivalent to a previous request to A. to perform the services or pay the money. A subsequent promise by B. to repay A. in such a case is held to amount to a ratification of A.'s act.<sup>1</sup> It has been said that when the plaintiff voluntarily does that which the defendant was legally bound to do, and the defendant afterwards in consideration thereof promises to pay the plaintiff for what he has done, such a promise is binding.<sup>2</sup> This doctrine does not seem clearly established by authority;<sup>3</sup> and on principle the defendant's liability in such cases ought, it seems, to be governed by the rules of agency, rather than by the theory of consideration.<sup>4</sup> If this be the correct view, the liability of the defendant upon a promise to pay the plaintiff for acts previously done must depend on the fact that those acts were done on behalf of the defendant rather than on the fact that the plaintiff did what the defendant was bound to do; and this seems to be the law.<sup>5</sup>

(5) MORAL OBLIGATION. — There are cases holding that a mere moral obligation is a sufficient consideration for a promise. This theory was advanced in *Lee v. Muggeridge*,<sup>6</sup> but was exploded in *Eastwood v. Kenyon*;<sup>7</sup> and the law to-day is settled both in England and America that mere moral obligation is no consideration for a promise.<sup>8</sup> The reason is obvious; the considera-

<sup>1</sup> *Gleason v. Dyke*, 22 Pick. 390; H. & W. 206; *Doty v. Wilson*, 14 Johns. 378.

<sup>2</sup> 1 Smith's L. C. 286 (9th Am. ed.).

<sup>3</sup> Anson, Contracts (8th ed.), 100-102.

<sup>4</sup> Langdell, Summary, § 74.

<sup>5</sup> *Doty v. Wilson*, *supra*; *Gleason v. Dyke*, *supra*.

<sup>6</sup> 5 Taunt. 36; L. 333.

<sup>7</sup> 11 A. & E. 438; L. 343.

<sup>8</sup> *Wilcox v. Arnold*, 116 N. C. 708; 21 S. E. 434; *Mills v. Wyman*, 3 Pick. 207; L. 370; H. & W. 201; *Cook v. Bradley*, 7 Conn. 57; H. & W. 133; *Musick v. Dodson*, 76 Mo. 624; *Hayward v.*

tion must be furnished in reliance on the promise. An obligation existing at the time the promise is made will support, as we have seen, only such promise as the law will imply from the existence of the obligation. Inasmuch as the law implies no promise to fulfil a moral obligation, such obligation cannot, of course, be a consideration at all.

(k) *Offer and Acceptance.* — (1) *RELATION OF OFFER AND ACCEPTANCE TO CONSIDERATION.* — If A. and B. agree to marry each other, they make a bilateral contract. A. promises to marry B. in consideration that B. promises to marry A. This contract may be regarded as resulting from A.'s offer of marriage and B.'s acceptance of his offer. Again, if C. says to D., "I will give you \$5 if you will cut my grass," and D. cuts the grass, D.'s act in cutting the grass is the consideration for C.'s promise, and we have a unilateral contract. A unilateral simple contract may therefore be regarded as originating in the offer of a promise for an act, and as completed when that offer is accepted by the performance of the specified act. And so a bilateral simple contract may be looked upon as originating in the offer of a promise for a promise, and in the acceptance of that offer by the giving of the required promise. In both cases, it is commonly said that the contract is complete when the offer is accepted. The reason for this rule is that what is called the acceptance of the offer is really the furnishing of the consideration for the promise. From this it follows that all the rules governing offer and acceptance can and should be reduced to rules of consideration.<sup>1</sup>

Barker, 52 Vt. 429; *Valentine v. Foster*, 1 Met. 520; L. 374; *contra*, *Goulding v. Davidson*, 26 N. Y. 604; *Spear v. Griffith*, 86 Ill. 552.

<sup>1</sup> Holmes, *Common Law*, 303.

(2) COMMUNICATION OF ACCEPTANCE. — It is frequently said that the acceptance of an offer must be communicated. This statement is as inaccurate and misleading as is the reason usually given for it, namely, that such communication is necessary in order that the minds of the contracting parties may meet. Neither in unilateral nor in bilateral contracts is the communication of acceptance an essential element. When an offer is made it is made in consideration either of an act to be done, or of a promise to be made by the offeree, and as soon as that act is done or that promise made the contract is complete. Thus, if A. writes to B. ordering B. to ship certain goods, the contract is complete as soon as the goods are shipped.<sup>1</sup> So, if A. employs B. to procure a purchaser for A.'s land, and promises to pay B. a commission in case he finds a purchaser, A. is liable to B. for his commission if B. sends A. a purchaser who buys the land of A., although A. did not know that the purchaser was sent by B.<sup>2</sup>

An apparent exception to the rule that communication of acceptance is unnecessary is found in some of the decisions in regard to guaranties. If A. promises C. to guaranty an indebtedness thereafter to be incurred by B., what C. must do to render A.'s promise binding is not entirely clear. If the guaranty is made in consideration of money paid or other act done by the guarantee at the time of the execution of the guaranty, we have a binding unilateral contract.<sup>3</sup> If the guaranty is made in consideration of the guarantee's promise to supply money or goods to the person whose indebtedness is to

<sup>1</sup> Lord Blackburn, in *Brogden v. Metropolitan Ry. Co.*, 2 A. C. 666, 691; *Boit v. Maybin*, 52 Ala. 252; *Finch v. Mansfield*, 97 Mass. 89; *Garbracht v. Commonwealth*, 96 Pa. St. 449.

<sup>2</sup> *Kelly v. Stone*, 62 N. W. 842; — Ia. —.

<sup>3</sup> *Davis v. Wells*, 104 U. S. 159.

be guarantied, we have a bilateral contract. The consideration for the guarantor's promise is the promise of the guarantee, and *vice versa*.<sup>1</sup> If, however, there is no such present consideration for the guaranty, the guaranty is not a contract at all, but a mere offer to guaranty.<sup>2</sup> What, then, is necessary to turn this offer to guaranty into a binding contract of guaranty?

The decisions do not afford a very satisfactory answer to the foregoing question. In *Edmonston v. Drake*,<sup>3</sup> Marshall, C. J. laid down the doctrine that in the case of a letter of credit the custom of merchants requires that the person making advances on the strength of such letter must notify the party issuing it within a reasonable time. The rule requiring such notice has been repeatedly reiterated.<sup>4</sup> In the earlier cases the rule is said to rest on the custom of merchants; in the later cases, it is said to be an instance of the rule "entering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise."<sup>5</sup> In the common law, however, whatever may be the rule in the jurisprudence of the Continent, no such rule as that just quoted from Matthews, J. exists, although it has been repeated so often that, if repetition could make the law, such a rule might have been established. The true rule in regard to such guaranties seems to be well stated by the Supreme

<sup>1</sup> *Wildes v. Savage*, 1 Story, 22.

<sup>2</sup> *Evans v. McCormick*, 167 Pa. St. 247; 31 A. 563; *Offord v. Davies*, 12 C. B. N. S. 748; L. 33.

<sup>3</sup> 5 Pet. 624.

<sup>4</sup> *Douglass v. Reynolds*, 7 Pet. 113; *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524; 6 S. Ct. 173; *Evans v. McCormick*, *supra*.

<sup>5</sup> *Matthews, J.*, in *Davis v. Wells*, 104 U. S. 159, 164.



Court of Massachusetts in a recent case.<sup>1</sup> Speaking of the case of the offer of a promise for an act, the court says: "Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for *the doing of the act is a sufficient acceptance*, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer.<sup>2</sup> But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time *after doing that which constitutes the acceptance*. In such a case it is *implied in the offer* that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding *upon the doing of the act* so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration." In the same case, however, the court holds that actual notice is not necessary, and that "if that is done which is fairly to be contemplated from their relations to the subject matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor."

The law in regard to the communication of acceptance

<sup>1</sup> Bishop v. Eaton, 161 Mass. 496; 37 N. E. 665.

<sup>2</sup> Bascom v. Smith, 164 Mass. 61; 41 N. E. 130.

may be summed up as follows. In the case of unilateral contracts the performance of the act specified in the offer as the consideration makes the promise binding. Notice of acceptance is generally unnecessary.<sup>1</sup> The acceptor, however, is bound to conform to the terms of the offer, and to act reasonably. If then the offer itself calls for notice of acceptance, such notice is essential. If the offer does not call for notice of acceptance, such notice may be rendered necessary by custom. In the case of letters of credit and other commercial guaranties the custom of merchants requires such notice, or, rather, requires that the guarantee should take reasonable steps to notify the guarantor that he has acted on the guaranty. The contract is complete when the consideration is furnished, that is, when the guarantee makes advances; but failure on the part of the guarantee to take reasonable steps to notify the guarantor of such advances within a reasonable time will discharge the guarantor. Failure to give notice is therefore a condition subsequent, putting an end to the contract; yet the anomalous rule has been laid down by the highest authority that the guarantee is bound to prove that he has given notice.<sup>2</sup> Logically, of course, it should be for the guarantor to show that he has received no notice, and is therefore discharged from the obligation which comes into existence as soon as the advances are made by the guarantee.

(1) *The Consideration is determined by the Promise.* — By our definition of contractual obligation, where the contract is bifactoral the primary act must determine the secondary act. In other words, the consideration which makes a parol promise binding must be that which is fixed by the promise itself. The promisee can

<sup>1</sup> Knowlton, J., in *First Nat. Bk. v. Watkins*, 154 Mass. 385, 387; 28 N. E. 275.

<sup>2</sup> *Douglass v. Reynolds*, 7 Pet. 113.

turn the promise into a contract only by doing that which the promisor has designated as the consideration for such promise.

There are cases where the consideration furnished by the promisee, though apparently in accordance with the requirements of the promisor, is in reality something different. For example, A. agrees to sell and B. to buy a certain amount of cotton "ex 'Peerless' from Bombay." There are two ships named "Peerless," sailing from Bombay. A. means one ship, and B. the other. There is no contract,<sup>1</sup> in spite of the apparent agreement, because there is no consideration for A.'s promise to sell or for B.'s promise to buy. A.'s promise in effect is, "I will sell you cotton from ship Peerless No. 1 if you will buy that cotton." B.'s promise is, "I will buy cotton from ship Peerless No. 2 if you will sell me that cotton." It follows, therefore, that, while there is an apparent contract consisting of mutual promises, in reality the promises are not mutual at all, and there is therefore no contract. It is just as if A. were to say to B., "I will sell you my horse for \$100," and B. should reply, "I will give you \$100 for your cow." This case is often treated as if the agreement were void on the ground of mistake; in reality, there is no contract because there is no consideration for either A.'s or B.'s promise. If in the case just put there had been only one ship "Peerless," but one of the parties had used the name by mistake for that of another ship, the contract would have been good. A. and B.'s promises would have been mutual, and would each have been a good consideration for the other, in spite of the mistake.<sup>2</sup>

Again, where A. agrees orally to sell B. a horse for \$165, and B. accepts A.'s offer, thinking that A. has

<sup>1</sup> *Raffles v. Wichelhaus*, 2 H. & C. 906; L. 39.

<sup>2</sup> *Ionides v. Pacific Ins. Co.*, L. R. 6 Q. B. 674, 686. See also *Holmes*, Common Law, 309.

offered the horse for \$65, there is no contract.<sup>1</sup> A.'s promise is, "I will sell you my horse for \$165." B.'s promise is, "I will give you \$65 for your horse." These two promises are both without consideration, and the apparent agreement is therefore not a contract. If, however, A.'s offer is in writing, and B. accepts it, the fact that B. makes a mistake in reading A.'s offer does not prevent the formation of a contract, as we have already seen.<sup>2</sup> Where the offer is in writing, B.'s acceptance is construed as a promise to pay the amount specified in the writing. Where A.'s offer is made orally, however, B.'s acceptance is construed only as a promise to pay the amount which B. thinks A. offers the horse for. In this case also the invalidity of the oral agreement is due, not to mistake, which exists equally where the contract is in writing, but to the fact that the promises on each side are not mutual, and therefore furnish no consideration for each other.

The consideration for a promise must be that which the promisor has specified. In our definition of bifactorial contractual obligation we have seen that the primary act determines not only the extent of the obligation, but also the secondary act itself; wherein contract differs from estoppel. The consideration may be a promise or an act; but if the promisor has specified as the consideration a promise to do a certain act, it is the promise, and not the doing of the act, which constitutes the consideration. For example, A. furnishes estimates to B. for the fitting up of B.'s offices. B. writes to A., "Upon an agreement to finish the fitting up of the offices in two weeks, you can begin at once." A. does not answer B.'s letter, but goes ahead and buys lumber for the offices and begins work thereon. B. then countermands his order, and A. sues B. for breach of contract. A. cannot recover. The consideration for B.'s

<sup>1</sup> *Rupley v. Daggett*, 74 Ill. 351.

<sup>2</sup> *Ante*, p. 48.

promise to pay for the work was not the performance of the work, but the making of an agreement to perform the work; and as A. has never promised to perform the work B.'s promise is without consideration, and is therefore not binding.<sup>1</sup>

The promise is always the primary, and the consideration the secondary act. When A. makes a promise to B., therefore, in consideration that B. will make a certain promise to A. in order that A.'s promise shall bind him it is necessary that B.'s promise should be made in response to A.'s; in other words, B.'s promise must be an acceptance of A.'s promise, and not a counter offer, even though such counter offer be the exact promise called for by A. "If I write to a person and say, 'If you can give me £6,000 for my house, I will sell it you,' and on the same day, and before that letter reaches him, he writes to me saying, 'If you will sell me your house for £6,000, I will buy it,' that would be two offers crossing each other, and cross offers are not an acceptance of each other."<sup>2</sup>

Since the consideration must be that which the promisor has specified, if A. makes a promise in consideration that B. will make a certain promise, B. must make that specific promise in order to bind A. Hence a conditional acceptance by B. of A.'s offer does not bind A;<sup>3</sup> nor does an acceptance varying in any respect from the terms of the offer complete the contract.<sup>4</sup> Such acceptance amounts merely to a counter offer.

<sup>1</sup> *White v. Corlies*, 46 N. Y. 467; W 512; H. & W. 7.

<sup>2</sup> *Brett, J.*, in *Tinn v. Hoffmann*, 29 L. T. N. S. 271, 278; W. 473.

<sup>3</sup> *Harris v. Scott*, 32 A. 770; — N. H. —; *Putnam v. Grace*, 161 Mass. 237; 37 N. E. 166; *Honeyman v. Marryatt*, 6 H. L. C. 112; *Briggs v. Sizer*, 30 N. Y. 647.

<sup>4</sup> *Minneapolis, &c. R. R. v. Columbus Rolling Mill*, 119 U. S. 149; 7 S. Ct. 168; H. & W. 74; *Baker v. Holt*, 56 Wis. 100; 14 N. W. 8; *Maynard v. Tabor*, 53 Me. 511; *Crossley v. Maycock*, L. R. 18 Eq. 180; *Jones v. Daniel* (1894), 2 Ch. 332.

The acceptance, moreover, must be made in the manner specified by the person making the offer. Thus where A. makes an offer to B., requesting an acceptance by return of the wagon which brings the offer, an acceptance sent to another place has no effect.<sup>1</sup>

The offer must be accepted, that is to say, the consideration must be furnished within the time specified by the offer.<sup>2</sup> If no time for acceptance of the offer is specified, the offer must be accepted within a reasonable time. What is a reasonable time depends entirely upon circumstances.<sup>3</sup> The offer comes to an end by self-limitation at the expiration of the prescribed time, or of a reasonable time, as the case may be.<sup>4</sup>

The contract is complete, and the offer becomes binding as soon as the offer is accepted, that is to say, as soon as the consideration is furnished. It has often been said that the acceptance must be communicated, but this statement has been shown to be misleading.<sup>5</sup> If the offerer expressly makes the formation of the contract dependent on the actual communication to him of the acceptance, then, of course, the acceptance must be so communicated.<sup>6</sup> In other cases the question is, not "Has the acceptance been communicated?" but "Has the acceptor done an overt act manifesting an intention to bind himself, and is that act one which, according to the ordinary usages of mankind, or according to the course of dealing between the parties, the offerer must

<sup>1</sup> *Eliason v. Henshaw*, 4 Wheat. 225; L. 70; H. & W. 38.

<sup>2</sup> *Longworth v. Mitchell*, 26 Ohio St. 334; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Maclay v. Harvey*, 90 Ill. 525; H. & W. 41; *Waterman v. Banks*, 144 U. S. 394; 12 S. Ct. 646.

<sup>3</sup> *Averill v. Hedge*, 12 Conn. 424; L. 90; *Ramsgate Hotel Co. v. Montefiore*, L. R. 1 Ex. 109; L. 40; *Loring v. Boston*, 7 Met. 409; L. 99; *Minnesota Oil Co. v. Collier, &c. Co.*, 4 Dill. 431; H. & W. 46.

<sup>4</sup> *Pollock, Contracts*, 24.

<sup>5</sup> *Ante*, p. 86.

<sup>6</sup> *Lewis v. Browning*, 130 Mass. 173; W. 505.

have contemplated as an acceptance?" Many cases have arisen in the case of contracts by correspondence involving the question when a contract is completed. After some uncertainty,<sup>1</sup> it was finally settled in England<sup>2</sup> that "where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."<sup>3</sup> The same rule prevails throughout the United States,<sup>4</sup> with the exception of Massachusetts, where an early case<sup>5</sup> laid down the doctrine that actual communication of the acceptance is necessary to complete the contract. There has been much artificial reasoning on this point, caused by a desire on the part of judges and text-writers to make every case harmonize with the subjective consensual theory of contract, that there must be a "meeting of minds" to constitute a contract. It would seem as if the simple and straightforward reasoning of Lord Herschell in *Henthorn v. Fraser*,<sup>6</sup> the latest English case on this point, ought to sweep away the fog which has so long obscured this simple though important question.

In Alabama the peculiar doctrine prevails that when an offer is sent by mail and properly accepted, the contract becomes binding as of the date that the offer was

<sup>1</sup> Harris's Case, L. R. 7 Ch. 587; L. 54.

<sup>2</sup> Household Fire Ins. Co. v. Grant, 4 Ex. D. 216, W. 481.

<sup>3</sup> Lord Herschell, in *Henthorn v. Fraser* (1892), 2 Ch. 27, 33; W. 498.

<sup>4</sup> *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390; L. 106; H. & W. 29; *Mactier v. Frith*, 6 Wend. 103; L. 77.

<sup>5</sup> *M'Culloch v. Eagle Ins. Co.*, 1 Pick. 278; L. 72. There seems little doubt that this case will be overruled in Massachusetts at the first opportunity. See *Bishop v. Eaton*, 161 Mass. 496; 37 N. E. 665.

<sup>6</sup> *Supra*.

mailed.<sup>1</sup> This doctrine seems to be the result of a mere judicial vagary.

Since the contract is complete when the letter of acceptance is posted, the subsequent fate of the letter is of no consequence.<sup>2</sup> The same reasoning applies where an offer is accepted in some other way than by post. Thus, where A., in compliance with the usual or occasional practice, deposits a letter accepting B.'s offer in B.'s letter-box, such deposit completes the contract, though the acceptance is never received.<sup>3</sup>

So where the parties have agreed to transact business by telegraph, the contract is complete as soon as the telegram accepting the offer is delivered to the telegraph company.<sup>4</sup>

Mere determination to accept an offer is of no effect, and even the doing of some act in pursuance of that determination, as, for instance, starting on a journey to meet the offerer, is insufficient, unless that act be the act called for by the offeree.<sup>5</sup>

An offer cannot be accepted after it has once been rejected; and a proposal to accept, or an acceptance varying from the terms of the offer, amounts to a rejection.<sup>6</sup>

(*m*) *Revocation of Promise.* — Since the consideration must be furnished in reliance on the promise, the promise may be withdrawn at any time before the con-

<sup>1</sup> *Hatchett v. Molton*, 76 Ala. 410; *Garrett v. Trabue*, 82 Ala. 227; 3 S. 159.

<sup>2</sup> *Household Fire Ins. Co. v. Grant*, *supra*; *Vassar v. Camp*, 11 N. Y. 441; L. 110; *Washburn v. Fletcher*, 42 Wis. 152.

<sup>3</sup> *Howard v. Daly*, 61 N. Y. 362.

<sup>4</sup> *Trevor v. Wood*, 36 N. Y. 306; *Pattee's Cases on Contracts*, 212; *Minnesota Oil Co. v. Collier, & Co.*, 4 Dill. 431; H. & W. 46.

<sup>5</sup> *Trounstone v. Sellers*, 35 Kans. 447; 11 P. 441.

<sup>6</sup> *Hyde v. Wrench*, 3 Beav. 334; L. 13; *Minneapolis, &c. R. R. v. Columbus Rolling Mill*, 119 U. S. 149; 7 S. Ct. 168; H. & W. 74.



sideration has been furnished.<sup>1</sup> When the promisor wishes to revoke his promise, he may attempt to do so in one of two ways; by notifying the promisee, or by doing some act rendering the performance of such promise impossible.

If an offer is made which by its terms is to remain open for a specified time, or for a reasonable time, acceptance of the offer within that time completes the contract,<sup>2</sup> unless the offeree is actually notified of the revocation of such offer before acceptance,<sup>3</sup> or unless the offerer has done some act rendering the performance of his promise impossible, and the offeree has actual knowledge of the fact that performance has become impossible.<sup>4</sup>

As to the proposition that the acceptance of an offer before that offer has expired by self-limitation completes the contract, there can hardly be any dispute. It is important to notice very carefully, however, the exact time during which an offer is to remain open. As has already been stated, if no time is specified in the offer within which it must be accepted, a reasonable time will be implied; but a reasonable time to accept an offer on the stock exchange might be a few seconds, while that for the acceptance of an offer to sell a farm might be days or even weeks. Moreover, a distinction has been drawn between the case where an offer is made to remain open for a given time, and the case where an offer is made which in the ordinary course of things

<sup>1</sup> *Offord v. Davies*, 12 C. B. N. S. 748; L. 33.

<sup>2</sup> *Boston & Maine R. R. Co. v. Bartlett*, 8 Cush. 224; L. 103.

<sup>3</sup> *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Henthorn v. Fraser* (1892), 2 Ch. 27; W. 498; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390; L. 106; H. & W. 29; *Patrick v. Bowman*, 149 U. S. 411; 13 S. Ct. 811, 866.

<sup>4</sup> *Dickinson v. Dodds*, 2 C. D. 463; L. 61; *Coleman v. Applegarth*, 68 Md. 21; 11 A. 284; H. & W. 57.

ought to be accepted within a certain time, but where there is a collateral promise to leave the offer open for a longer time. In the former case, acceptance within the given time completes the contract;<sup>1</sup> in the latter case, acceptance of the offer after the ordinary time, but before the expiration of the time specified in the collateral promise, has no effect, such collateral promise not being binding for want of consideration. The case of *Cooke v. Oxley*,<sup>2</sup> which is the leading authority for this distinction, has been sharply criticised, but the case has been ably defended by Mr. Benjamin,<sup>3</sup> and seems to be still authoritative.

That a promise cannot be turned into a contract by the promisee when he knows that the promisor has put it out of his power to perform such promise seems to be the logical conclusion from the case of *Dickinson v. Dodds*.<sup>4</sup> In that case the defendant offered to sell a certain piece of land to the plaintiff, the offer to remain open till Friday morning. On Thursday the defendant sold the land to another party. The plaintiff accepted the defendant's offer, and notified the defendant of his acceptance before the time for acceptance had expired, but after the plaintiff had learned of the sale. The court held there was no contract. Various reasons have been suggested for the decision,<sup>5</sup> but a recent reference to the case<sup>6</sup> seems to show that the English courts regard the fact that the plaintiff knew of the sale before he sent his acceptance as the important element in the case. Nice questions as to whether the offeree must have actual knowledge of the fact that it is impossible for the

<sup>1</sup> *Boston & Maine R. R. Co. v. Bartlett*, *supra*; *Cheney v. Cook*, 7 Wis. 413; *contra*, *Bean v. Burbank*, 16 Me. 458.

<sup>2</sup> 3 T. R. 653; L. 2.

<sup>4</sup> 2 Ch. D. 463; L. 61.

<sup>3</sup> Sales, §§ 64-66.

<sup>5</sup> Anson, *Contracts* (4th ed.), 29.

<sup>6</sup> See opinion of Lord Herschell, in *Henthorn v. Fraser* (1892), 2 Ch. 27; W. 498.

offerer to perform, or whether the means of knowledge are sufficient to deprive him of the right to accept the offer, still remain unanswered. It seems, however, if notice of revocation is to be dispensed with, that the offerer ought at least to have actual knowledge of the withdrawal of the offer. Whether the mere fact that the offerer has put it out of his power to perform his promise is in itself ever a sufficient revocation is perhaps doubtful. Such conduct on the part of the promisor can have no effect where the parties are doing business by correspondence;<sup>1</sup> and even where they are in immediate communication with each other, it seems that knowledge on the part of the offeree of the change in the offerer's position ought to be deemed essential to constitute a revocation.<sup>2</sup>

Where an offer is made to the public, as in the case of an offer of a reward, or of the publication of time tables by a railway company, the offer may be revoked in the same manner in which it was made;<sup>3</sup> otherwise, actual notice of revocation must be given.<sup>4</sup>

An offer may be terminated not only by self-limitation and by revocation, but also by operation of law.

An offer is terminated by operation of law when the offerer dies.<sup>5</sup> It is generally held that the offeree's ignorance of the offerer's death is of no consequence;<sup>6</sup> but in Alabama a different view seems to prevail.<sup>7</sup>

<sup>1</sup> *Adams v. Lindsell*, 1 B. & Ald. 681; L. 4.

<sup>2</sup> *Bean v. Burbank*, 16 Me. 458, might seem an authority to the contrary; but the reasoning of the court puts that decision on a different ground.

<sup>3</sup> *Shuey v. U. S.*, 92 U. S. 73; *Pattee's Cases on Contracts*, 216.

<sup>4</sup> *Sears v. Eastern R. R. Co.*, 14 Allen, 433.

<sup>5</sup> *Pratt v. Trustees*, 93 Ill. 475; H. & W. 35; *Helpenstein's Estate*, 77 Pa. St. 328; *Wallace v. Townsend*, 43 Ohio St. 537; 3 N. E. 601.

<sup>6</sup> *Wallace v. Townsend*, *supra*.

<sup>7</sup> *Garrett v. Trabue*, 82 Ala. 227; 3 S. 159; *Davis v. Davis*, 93 Ala. 173; 9 S. 736. These are cases of agency, but they seem to support the statement in the text.

An offer is also terminated by operation of law when the offerer becomes insane;<sup>1</sup> but in such case knowledge of the insanity on the part of the offerer seems essential.<sup>2</sup>

(n) *Consideration in Deeds.* — The rules of consideration heretofore stated apply only to simple contracts. In the case of deeds, no consideration is necessary, except in the single case where the deed is a contract in restraint of trade. If a promise is made upon a given consideration, and that promise is under seal, the contractual obligation is created by the signing, sealing, and delivery of the deed, and not by the furnishing of the consideration. The consideration in such cases may be merely an unessential recital, or it may amount to a condition affecting the obligation of the deed, but it cannot affect the existence of the deed; whereas in a simple contract the furnishing of the consideration by the promisee is a condition precedent to the existence of a contract.

(o) *Consideration in Negotiable Instruments.* — In the case of negotiable instruments, such as bills of exchange, promissory notes, and checks, the rules of consideration are peculiar. In many respects these instruments possess the characteristics of formal contracts. By the custom of merchants, indeed, they were formal contracts; but the courts of Westminster Hall, though recognizing in some degree the formal character of such instruments, refused to adopt the custom of merchants in its entirety. To the formal requirements of the merchants the courts added the requirement that these mercantile contracts must have a valuable consideration.

<sup>1</sup> *Beach v. First M. E. Church*, 96 Ill. 177.

<sup>2</sup> See *Drew v. Nunn*, 4 Q. B. D. 661 (a case of agency); *Imperial Loan Co. v. Stone* (1892), 1 Q. B. 599.

Nevertheless, the ordinary rules of consideration were not strictly applied to negotiable instruments. In ordinary simple contracts the party setting up the contract must prove the consideration, while in the case of a negotiable instrument the holder of the instrument makes out his case by proving its execution, the other party being allowed, however, to prove that there was no consideration given for the instrument. Although a valuable consideration is required, such consideration may be antecedent to the promise; while in the case of ordinary contracts the consideration must be subsequent, and furnished in reliance on the promise. If, therefore, a bill or note is given in consideration of an existing legal liability, it is binding without regard to the amount of such liability; whereas, as we have seen, such antecedent liability will ordinarily support only such a promise as the law will imply. Negotiable instruments have this in common with specialties, that delivery brings the instrument into existence. They differ from specialties, however, in this, that, while delivery of a sealed instrument makes such instrument binding without more, delivery of a negotiable instrument makes such instrument binding only when there is a valuable consideration for the instrument. This valuable consideration, however, differs from the consideration which exists in ordinary simple contracts, in that it may be either antecedent or subsequent. Where the consideration is antecedent, the obligation of the instrument is unifactoral; where the consideration is subsequent, the obligation is bifactoral.

## CHAPTER II.

## ILLEGAL CONTRACTS.

## § 1. Introductory.

Hitherto we have examined the internal structure of contracts, and have seen what elements are required in our law to constitute a contract. These elements may all be present, however, and yet fail to create any contractual obligation, by reason of some external limitation imposed by the law upon individual freedom of contract. If the elements discussed in the previous chapter are lacking, there is no contract; if these elements are present, but some rule of law prevents their giving rise to contractual obligation, we have an illegal contract.

Contracts are enforced by the courts, not for the benefit of the parties, but because the law regards the enforcement of contracts in general as essential to the welfare of the community. Whenever, therefore, it appears that it would be prejudicial to the public interest to enforce a particular kind of contracts, the courts refuse to enforce contracts of that character.

## § 2. Classes of Illegal Contracts.

Illegal contracts may be classified as follows.

*(a) Prohibited Contracts.*

First, contracts the making of which is expressly forbidden by legislative authority, or which are expressly declared void by such authority.

*(b) Contracts to do a Prohibited Act.*

Secondly, contracts to do an act prohibited by law. Under this head come contracts to commit any kind of crime. It is generally held that an act is prohibited if a statute provides a penalty for its commission,<sup>1</sup> unless such penalty is imposed solely for the purpose of protecting the revenue;<sup>2</sup> but the distinction between revenue and other statutes has been criticised.<sup>3</sup> The real question in such cases is whether the legislature has intended to prohibit the contract or not, and the courts differ in their construction of the legislative intention.<sup>4</sup> Even in cases where only the revenue laws are involved, if the agreement amounts to a fraud on the revenue it is illegal.<sup>5</sup>

*(c) Contracts contemplating an Injury to the Legal Rights of a Third Party.*

Thirdly, contracts contemplating an injury to the legal rights of a third party. The following are instances of such illegal contracts: an agreement to beat another;<sup>6</sup> to publish a libel;<sup>7</sup> to commit a fraud on a third party.

<sup>1</sup> *Union Bank v. Louisville, &c. Ry.*, 145 Ill. 208; 34 N. E. 135; *Cope v. Rowlands*, 2 M. & W. 149; W. 253.

<sup>2</sup> *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 B. & C. 93; *Larned v. Andrews*, 106 Mass. 435; *Aiken v. Blaisdell*, 41 Vt. 655, W. 264.

<sup>3</sup> *Greenhood*, Public Policy, 581, 582.

<sup>4</sup> *Larned v. Andrews*, *supra*; *Cope v. Rowlands*, *supra*; *Miller v. Ammon*, 145 U. S. 421; 12 S. Ct. 884; *Pangborn v. Westlake*, 36 Ia. 546; H. & W. 315; *Bowditch v. New Eng. Mut. Life Ins. Co.*, 141 Mass. 292; 4 N. E. 798; W. 259; *Bisbee v. McAllen*, 39 Minn. 143; 39 N. W. 299; W. 263.

<sup>5</sup> *Johnson v. Hudson*, *supra*.

<sup>6</sup> *Allen v. Rescous*, 2 Lev. 174.

<sup>7</sup> *Clay v. Yates*, 1 H. & N. 73.

The commission of a fraud on a third party may be brought about in a great variety of ways. One of the most common instances of such fraudulent contracts is found in the case of compositions by insolvent debtors with their creditors where one creditor tries to get a larger share of his claim than the rest. A secret agreement that one creditor shall receive more than the others who sign a composition with the debtor is illegal, since the effect of such an agreement is to defraud the other creditors.<sup>1</sup> The agreement to pay one creditor for his assent to the composition is a fraud on the other creditors because they have a right to suppose that all creditors stand on an equal footing.<sup>2</sup> The agreement is therefore void even though it does not in any way diminish the debtor's estate; as when a third party promises the creditor an additional amount if he will sign the composition with the other creditors.<sup>3</sup> It is held in Illinois, however, that the fraud on the creditors does not invalidate the composition unless they receive some other injury than the understanding that all are to share equally.<sup>4</sup>

Such a fraud on the creditors renders the whole composition void, and they may recover their entire claims.<sup>5</sup> The debtor, nevertheless, can set up the composition in defence to an action on the original claim by the creditor to whom the fraudulent preference has been given.<sup>6</sup> In a recent New York case,<sup>7</sup> however, the facts were as

<sup>1</sup> *Mallalien v. Hodgson*, 16 Q. B. 689; *Frost v. Gage*, 3 Allen, 560; W. 241; *Brown v. Nealley*, 161 Mass. 1; 36 N. E. 464.

<sup>2</sup> *Danglish v. Tennent*, L. R. 2 Q. B. 49, 54; *Frost v. Gage*, *supra*; *Bell v. Leggett*, 7 N. Y. 176.

<sup>3</sup> *Frost v. Gage*, *supra*; *Bell v. Leggett*, *supra*.

<sup>4</sup> *Bartlett v. Blaine*, 83 Ill. 25.

<sup>5</sup> *Partridge v. Messer*, 14 Gray, 180.

<sup>6</sup> *Huckins v. Hunt*, 138 Mass. 366.

<sup>7</sup> *Hanover Nat. Bank v. Blake*, 142 N. Y. 406; 37 N. E. 519.



follows: A., a debtor, entered into a composition deed with his creditors, whereby he was to pay 40 per cent of his indebtedness in instalments, payable by four notes, due at different dates, the last two notes to be indorsed by C. D., a creditor, procured C.'s indorsement to *all* the notes which A. gave him, without the knowledge of the other creditors. In an action on the *third* note by D. judgment was given for D. The court held that the agreement for the indorsement of the first two notes by C. was a fraud on the other creditors, and therefore void, but that such agreement was separable from the composition agreement, and that the latter could be enforced. The New York court refuses to follow the English rule<sup>1</sup> that the creditor who obtains a fraudulent preference cannot recover the amount of the composition, because the whole agreement is vitiated by his fraud. Nevertheless, the English rule seems more logical.

The following are further instances of contracts which are illegal because contemplating a fraud on third persons: a contract to bid in property for the auctioneer at an auction sale;<sup>2</sup> to pay one co-tenant for failing to oppose the confirmation of a partition sale at an inadequate price;<sup>3</sup> not to bid at an auction for the purpose of stifling competition;<sup>4</sup> to purchase shares at a fictitious premium in order to deceive others as to the value of the shares;<sup>5</sup> to sell goods with false labels attached for the purpose of deceiving the public.<sup>6</sup>

<sup>1</sup> Howden v. Haigh, 11 A. & E. 1033.

<sup>2</sup> Hinnen v. Newman, 35 Kans. 709; 12 P. 144.

<sup>3</sup> Tappan v. Albany Brewing Co., 80 Cal. 570; 22 P. 257.

<sup>4</sup> Barton v. Benson, 126 Pa. St. 431; 17 A. 642; Goldman v. Oppenheim, 118 Ind. 95; 20 N. E. 635; Gibbs v. Smith, 115 Mass. 592; W. 244.

<sup>5</sup> Scott v. Brown (1892), 2 Q. B. 724; W. 238.

<sup>6</sup> Materne v. Horwitz, 101 N. Y. 469; 5 N. E. 331; H. & W. 338; Church v. Proctor, 66 F. 240; — U. S. App. —.

Another class of contracts illegal by reason of infringing the rights of others is found in those cases where agreements are made tending to cause a breach of duty by an agent, trustee, or other fiduciary.<sup>1</sup> It has been said that such agreements are against public policy, it being public policy to secure fidelity in the discharge of their duties by such fiduciaries; but it seems more accurate to say that such agreements tending to cause unfaithful conduct by fiduciaries are illegal because they are in effect agreements to wrong the persons whose interests the fiduciaries have in charge.

The "Bohemian oats" contracts furnish an interesting example of ingenuity in devising new means for defrauding others. The substance of such contracts is as follows. A. sells to B. 25 bushels of "Bohemian oats" at \$10 a bushel, and agrees to sell 50 bushels of the same kind of oats for B. the next year at the same price, which is many times the value of the oats. Such a contract is illegal. It is held in Michigan to be a gambling contract,<sup>2</sup> while the Iowa decisions are to the contrary;<sup>3</sup> but aside from the question of gambling, the contract is illegal because it contemplates defrauding some one by selling him the oats at a fictitious value.<sup>4</sup>

<sup>1</sup> *West v. Camden*, 135 U. S. 507; 10 S. Ct. 838; *Guernsey v. Cook*, 120 Mass. 501; W. 226; *Wilbur v. Stoepel*, 82 Mich. 344; 46 N. W. 724; *Cone v. Russell*, 48 N. J. Eq. 208; 21 A. 847; *Woodstock Iron Co. v. Richmond & Danville Extension Co.*, 129 U. S. 643; 9 S. Ct. 402; W. 219.

<sup>2</sup> *McNamara v. Gargett*, 68 Mich. 454; 36 N. W. 218.

<sup>3</sup> *Hanks v. Brown*, 79 Ia. 560; 44 N. W. 811; *Merrill v. Packer*, 80 Ia. 542; 45 N. W. 1076; *Shipley v. Reasoner*, 80 Ia. 548; 45 N. W. 1077.

<sup>4</sup> *Davis v. Seeley*, 71 Mich. 209; 38 N. W. 901; *Glass v. Murphy*, 30 N. E. 1097; 31 N. E. 545; 4 Ind. App. 530; *Schmueckle v. Waters*, 125 Ind. 265; 25 N. E. 281; and Iowa cases *supra*.

*(d) Contracts against Public Policy.*

In addition to these specific classes of illegal contracts, there are many contracts which the courts refuse to enforce on grounds of "public policy." Such contracts tend in one way or another to injure the public welfare, and are therefore illegal. Such contracts may be divided into three classes: first, contracts tending to injure the State in its external relations; second, contracts tending to interfere with the internal administration of the government; third, contracts tending to injure the public welfare by injuring the citizens of the State.

(1) **CONTRACTS TENDING TO INJURE THE STATE IN ITS EXTERNAL RELATIONS.** — The first class of contracts is generally treated in connection with the subject of International Law. Trading with an alien enemy is the most common example of such contracts.<sup>1</sup>

(2) **CONTRACTS TENDING TO INTERFERE WITH THE INTERNAL ADMINISTRATION OF THE GOVERNMENT.** — The second class of contracts includes, first, contracts tending to interfere with the election or appointment of public officers; second, contracts tending to prevent public officers from performing their duties properly; third, contracts tending to obstruct the administration of justice.

(a) *Contracts tending to Interfere with the Election or Appointment of Public Officers.* — Contracts tending to interfere with the election or appointment of public officers are illegal. Among such contracts are included contracts for the sale of public offices;<sup>2</sup> contracts tending to diminish competition for public office;<sup>3</sup> contracts to

<sup>1</sup> U. S. v. Grossmayer, 9 Wall. 72; H. & W. 215.

<sup>2</sup> Robertson v. Robinson, 65 Ala. 611.

<sup>3</sup> Gray v. Hook, 4 N. Y. 449; Hunter v. Nolf, 71 Pa. St. 282.

pay for securing an office,<sup>1</sup> or a recommendation thereto;<sup>2</sup> contracts to pay the holder of an office for resigning;<sup>3</sup> and contracts tending to prevent the exercise by a voter of his best judgment in voting.<sup>4</sup>

(b) *Contracts tending to prevent Public Officers from performing their Duties.* — Contracts tending to prevent persons holding public office from performing these duties are of great variety. First may be mentioned contracts for the assignment of the emoluments of a public office before they are earned.<sup>5</sup> If such emoluments could be assigned, the public service would suffer from the fact that the assignor had no interest in the compensation to be paid for his work. Again, a contract is illegal when it involves a promise to pay for any official act by one holding executive, legislative, or judicial office. If there is a promise to pay the officer for doing his duty, this promise is, as we have seen, without consideration.<sup>6</sup> If the promise, however, is to pay for the doing of an official act in regard to which the officer is bound to exercise his best judgment, the contract is illegal, since it tends to deprive the public of the exercise of the officer's discretion, to which the public is entitled. Such transactions amount simply to bribery, and are corrupt in their very nature. The mere fact that the agreement in question has a tendency to produce corruption is sufficient to render it illegal. Thus a contract to control legislative, executive, or

<sup>1</sup> *Meguire v. Corwine*, 101 U. S. 108; W. 216.

<sup>2</sup> *Hartwell v. Hartwell*, 4 Ves. 811.

<sup>3</sup> *Eddy v. Capron*, 4 R. I. 394.

<sup>4</sup> *Nichols v. Mudgett*, 32 Vt. 546.

<sup>5</sup> *Bowery Nat. Bk. v. Wilson*, 122 N. Y. 478; 25 N. E. 855; holding that there is no difference in this regard between fees and salaries.

<sup>6</sup> And has also been held against public policy. *Foley v. Platt*, 63 N. W. 520; — Mich. —.

judicial action is illegal;<sup>1</sup> though a contract for professional services in presenting a claim to the proper authorities is valid.<sup>2</sup> There seems to be no distinction in principle between agreements to influence the conduct of private agents and public officials. "Indeed, the law is general that agreements upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary character to private parties, are against the true policy of the State, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties and the most efficient way of discharging them. They are therefore necessarily corrupt in their tendency."<sup>3</sup>

A contract is against public policy for like reasons whenever it introduces mercenary considerations to control the conduct of a private individual in a case where such conduct ought to be influenced only by a regard for the public welfare. As has been seen, an agreement to pay a voter for his vote is illegal; and the same principle applies where there is a contract to pay a man for his action in a matter where the public interest is concerned. Thus a contract to pay a property-owner for signing a petition to secure action by public officers, as in the case where a franchise is sought, or a public improvement to be made, is illegal.<sup>4</sup>

<sup>1</sup> *Trist v. Child*, 21 Wall. 441; W. 210; H. & W. 340; *Spalding v. Ewing*, 149 Pa. St. 375; 24 A. 219; *Tool Co. v. Norris*, 2 Wall. 45; *Woodman v. Innes*, 47 Kans. 26; 27 P. 125.

<sup>2</sup> *Barry v. Capen*, 151 Mass. 99; 23 N. E. 735; *Chesebrough v. Conover*, 140 N. Y. 382; 35 N. E. 603.

<sup>3</sup> *Field, J.*, in *Woodstock Iron Co. v. Richmond, &c. Co.*, 129 U. S. 643, 662; W. 219.

<sup>4</sup> *Maguire v. Smock*, 42 Ind. 1; *Howard v. First Church*, 18 Md.

So a contract to pay for establishing a particular route for a railroad, or for locating a station at a particular place is illegal.<sup>1</sup>

(c) *Contracts tending to Obstruct the Administration of Justice.* — Any contract tending to obstruct the administration of justice is illegal.

1. MAINTENANCE AND CHAMPERTY. — A contract is regarded as obstructing the administration of justice when it involves the encouragement of litigation by means of maintenance or champerty. Maintenance consists in aiding the suit of another without lawful excuse. An agreement to divide the proceeds of the suit between the plaintiff and the party maintaining him constitutes champerty at common law.

The rules against maintenance and champerty are of ancient origin, and were intended to prevent the encouragement of litigation by the interference of parties who had no interest therein. The essential feature of maintenance is that it involves an officious intermeddling with litigation. Hence if a person has an interest in the outcome of a suit he cannot be guilty of maintenance.<sup>2</sup> Belief that one has an interest in the suit, however, is not sufficient, unless such belief is founded on a mistake of fact.<sup>3</sup> The interest must be a legal as distinguished from a sentimental interest in the result of the action. Hence it is maintenance for A. to assist B. in a suit against C. for libelling B., although the verdict might affect A.'s reputation indirectly.<sup>4</sup>

451; *Doane v. Chicago City Ry. Co.*, — Ill. — (1896); 28 *Chicago Legal News*, 83.

<sup>1</sup> *Fuller v. Dame*, 18 Pick. 472; *Bestor v. Wathen*, 60 Ill. 138; and see *Woodstock & Iron Co. v. Richmond, &c. Co.*, *supra*.

<sup>2</sup> *Davies v. Stowell*, 78 Wis. 334; 47 N. W. 370.

<sup>3</sup> *Alabaster v. Harness* (1895), 1 Q. B. 339.

<sup>4</sup> *Alabaster v. Harness*, *supra*.

The following excuses for champerty and maintenance are recognized: consanguinity,<sup>1</sup> affinity,<sup>2</sup> the relation of landlord and tenant,<sup>3</sup> or of master and servant,<sup>4</sup> charity to the poor,<sup>5</sup> and the exercise of the legal profession.<sup>6</sup>

In America the rules against champerty and maintenance are in some jurisdictions said not to exist.<sup>7</sup> In other jurisdictions the existence of such rules is recognized, but the extent of the rules is much narrowed by the courts.<sup>8</sup> The tendency in America is to diminish the force of these rules; in England, to adhere strictly to the common law.<sup>9</sup>

It is essential in order to constitute champerty that the compensation for the services rendered should consist of a part of the proceeds of the litigation.<sup>10</sup> Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, although pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous.<sup>11</sup>

<sup>1</sup> This excuse applies in England only to maintenance, and not to champerty. *Hutley v. Hutley*, L. R. 8 Q. B. 112; W. 162; and see *Barnes v. Strong*, 1 Jones Eq. 100.

<sup>2</sup> *Thalhimer v. Brinckerhoff*, 3 Cow. 623. See preceding note.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> The idea of charity excludes champerty, of course.

<sup>6</sup> This excuse applies only to maintenance. *Blaisdell v. Ahern*, 144 Mass. 393; 11 N. E. 681; W. 167.

<sup>7</sup> *Schomp v. Schenck*, 40 N. J. L. 195, 202-206.

<sup>8</sup> *Reece v. Kyle*, 49 Ohio St. 475; 31 N. E. 747; *Brown v. Bigné*, 21 Or. 260; 28 P. 11; where the court limits the rules against champerty and maintenance to cases of oppression, gambling, and extortion.

<sup>9</sup> *Alabaster v. Harness*, (1895) 1 Q. B. 339.

<sup>10</sup> *Blaisdell v. Ahern*, *supra*.

<sup>11</sup> *Thompson v. Reynolds*, 73 Ill. 11; W. 169; *Blaisdell v. Ahern*, *supra*.

It is generally held that in order to make an agreement champertous the party who is to receive a portion of the proceeds of the suit must also agree to contribute to the expense thereof; that the mere rendering of services without advancing money is insufficient.<sup>1</sup>

The assignment of a chose in action is in some cases void on the ground of maintenance. The ancient law was very strict in this respect, but in modern times the courts have shown a more liberal tendency in recognizing the validity of assignments. The assignment of a right to recover money due on a contract is almost universally legal. But the assignment of a right to file a bill in equity on the ground of fraud is void for maintenance.<sup>2</sup> And in general rights of action for personal injuries cannot be assigned. As to the sale of property which is in litigation, "the sale of an interest to which a right to sue is incident is good; but the sale of a mere right to sue is bad."<sup>3</sup>

The question of champerty can be raised only in a controversy between the parties to the contract. It is no defence to an action that the attorney for the plaintiff is prosecuting the suit under a champertous agreement with his client.<sup>4</sup>

<sup>1</sup> Phillips v. South Park Commissioners, 119 Ill. 626, 10 N. E. 230; Allard v. Lamirande, 29 Wis. 502; Hamilton v. Gray, 31 A. 315;— Vt. —; *contra*, Ackert v. Barker, 131 Mass. 436; W. 165; H. & W. 354.

<sup>2</sup> Illinois Land & Loan Co. v. Speyer, 138 Ill. 137; 27 N. E. 931; Prosser v. Edmonds, 1 Y. & C. Ex. 481.

<sup>3</sup> Pollock, Contracts, 299; Prosser v. Edmonds, *supra*; Dickinson v. Burrell, L. R. 1 Eq. 337, 342.

<sup>4</sup> Small v. Chicago, &c. R. R. Co., 55 Ia. 583; 8 N. W. 437; W. 175; Burnes v. Scott, 117 U. S. 582; 6 S. Ct. 865; Chamberlain v. Grimes, 60 N. W. 948; 42 Neb. 701; Omaha & R. V. Ry. Co. v. Brady, 39 Neb. 27; 57 N. W. 767; Zeigler v. Mize, 132 Ind. 403; 31 N. E. 945; Torrence v. Shedd, 112 Ill. 466; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1; 29 N. E. 573; *contra*, Barker v. Barker, 14 Wis. 131; Kelly v. Kelly, 86 Wis. 170; 56 N. W. 637.



## 112 ELEMENTS OF THE LAW OF CONTRACTS.

2. **CONTRACTS TENDING TO STIFLE PROSECUTION.** — An agreement tending to stifle the prosecution of a crime is illegal.<sup>1</sup> It has been held that an agreement to compromise a prosecution for a misdemeanor is legal.<sup>2</sup> This doctrine is unsound in principle, and does not prevail in this country;<sup>3</sup> while in England it is now limited to cases in which the offence is not a matter of public concern.<sup>4</sup> An agreement to recommend a *nolle prosequi* in consideration that an accused person will give evidence against others is not illegal.<sup>5</sup> Nor is it illegal for a creditor to take security from a debtor who has committed a crime, if there is no agreement to stifle the prosecution.<sup>6</sup> A contract is illegal not merely when made in consideration of the stifling of the prosecution, but also when it is made in such a way as to induce the promisor to believe that the prosecution will be stopped.<sup>7</sup> Mere expectation, however, that the prosecution will be stopped is insufficient.<sup>8</sup>

3. **MISCELLANEOUS.** — An agreement to pay for procuring<sup>9</sup> or suppressing<sup>10</sup> evidence is illegal, ex-

<sup>1</sup> *Williams v. Bayley*, L. R. 1 H. L. 200; W. 177; *Henderson v. Palmer*, 71 Ill. 579; *Friend v. Miller*, 52 Kans. 139; 34 P. 397.

<sup>2</sup> *Fallowles v. Taylor*, 7 T. R. 475.

<sup>3</sup> *Jones v. Rice*, 18 Pick. 440; *Partridge v. Hood*, 120 Mass. 403, H. & W. 348; *Wynne v. Whisenant*, 37 Ala. 46.

<sup>4</sup> *Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371; *Windhill Local Board v. Vint*, 45 C. D. 371.

<sup>5</sup> *Nickelson v. Wilson*, 60 N. Y. 362; W. 189.

<sup>6</sup> *Flower v. Sadler*, 10 Q. B. D. 572; W. 187; *Ward v. Lloyd*, 6 M. & G. 785; *Thorn v. Pinkham*, 84 Me. 101; 24 A. 718; *Portner v. Kirschner*, 169 Pa. St. 472; 32 A. 442.

<sup>7</sup> *Williams v. Bayley*, *supra*; but see *Portner v. Kirschner*, *supra*.

<sup>8</sup> *Ward v. Lloyd*, *supra*.

<sup>9</sup> *Gillet v. Logan County*, 67 Ill. 256; *Goodrich v. Tenney*, 144 Ill. 422; 33 N. E. 44.

<sup>10</sup> *Valentine v. Stewart*, 15 Cal. 387; *Bierbauer v. Wirth*, 5 F. 336; *Crisup v. Grosslight*, 79 Mich. 380; 44 N. W. 621.

cept where a reward is offered for the detection of crime.<sup>1</sup>

The following contracts have also been held illegal as tending to interfere with the administration of justice. A contract by an attorney with his client to defend the latter against all prosecutions for violation of the liquor law, in consideration of a stipulated salary;<sup>2</sup> a contract by a justice of the peace with an attorney not to charge his lawful fees;<sup>3</sup> an agreement to indemnify the surety on a bail-bond in case of the escape of criminal;<sup>4</sup> an agreement to pay a justice of the peace a certain percentage of the stolen property recovered from one accused of larceny before him.<sup>5</sup>

4. CONTRACTS TO SUBMIT TO ARBITRATION. — Contracts to refer matters in dispute to arbitration have sometimes been said to be contrary to public policy. The effect of such a contract, however, is this: the contract itself is not illegal, and damages will be awarded for the breach of it.<sup>6</sup> The contract, however, will not be specifically enforced,<sup>7</sup> and will not in any way oust the ordinary jurisdiction of the courts.<sup>8</sup> If, however, the contract provides that no action shall be brought upon it until the matter has been referred to arbitration and an award made, the making of the award is in such case a valid condition precedent to a right of action for

<sup>1</sup> Williams v. Carwardine, 4 B. & Ad. 621; L. 12.

<sup>2</sup> Bowman v. Phillips, 41 Kans. 364; 21 P. 230.

<sup>3</sup> Willemin v. Batteson, 63 Mich. 309; 29 N. W. 734.

<sup>4</sup> Herman v. Jenchner, 15 Q. B. D. 561.

<sup>5</sup> Brown v. First Nat. Bank, 137 Ind. 655; 37 N. E. 158.

<sup>6</sup> Livingston v. Ralli, 5 E. & B. 132.

<sup>7</sup> Tobey v. County of Bristol, 3 Story, 800.

<sup>8</sup> Thompson v. Charnock, 8 T. R. 139; Reed v. Washington Ins. Co., 138 Mass. 572; W. 207; White v. Middlesex R. R. Co., 135 Mass. 216; W. 203.

breach of contract.<sup>1</sup> The Nebraska courts alone seem to deny the validity of such a condition.<sup>2</sup>

(3) **CONTRACTS TENDING TO INJURE THE CITIZENS OF THE STATE AS INDIVIDUALS.** — The State may be injured not merely by a contract hindering the proper administration of its affairs, but also by a contract injurious to its citizens as individuals. A contract is against public policy when it tends to injure the morals of the community, or to deprive individuals of that freedom which is regarded as essential to the welfare of the State, or to create a monopoly injurious to the public welfare.

(a) *Contracts Injurious to Public Morals.* — Contracts which are illegal because they tend to injure the morals of the community comprise contracts tending to promote sexual immorality, contracts tending to interfere with the marriage relation, and wagering or gambling contracts.

1. **SEXUAL IMMORALITY.** — As regards the first class of these contracts the reasons for their illegality are sufficiently obvious. A contract involving future illicit relations is illegal,<sup>3</sup> but a contract made in consideration of past cohabitation is not illegal, having no tendency to produce immoral results.<sup>4</sup>

2. **CONTRACTS TENDING TO INTERFERE WITH THE MARRIAGE RELATION.** — Contracts tending to interfere with the marriage relation are regarded as injurious to the welfare of society, in which the family is so impor-

<sup>1</sup> *Scott v. Avery*, 5 H. L. C. 811; W. 195; *Viney v. Bignold*, 20 Q. B. D. 172; W. 201; *Caledonian Ins. Co. v. Gilmour*, (1893) A. C. 85; *Hamilton v. Liverpool Ins. Co.*, 136 U. S. 242; 10 S. Ct. 945; H. & W. 352; *Hood v. Hartshorn*, 100 Mass. 117.

<sup>2</sup> *National Masonic Ass'n v. Burr*, 44 Neb. 256; 62 N. W. 466; *Ins. Co. v. Bachler*, 44 Neb. 549; 62 N. W. 911.

<sup>3</sup> *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *Baldy v. Stratton*, 11 Pa. St. 316; *Boigner v. Boulon*, 54 Cal. 146; H. & W. 357.

<sup>4</sup> *Bunn v. Winthrop*, 1 Johns. Ch. 329.

tant an institution. Contracts looking to a future separation of husband and wife are regarded as tending to offer inducements for the breach of marital duties, and are illegal.<sup>1</sup> But contracts for immediate separation are valid, the breach of duty in such cases being past.<sup>2</sup> Contracts facilitating divorce, such as agreements for the withdrawal of opposition to divorce proceedings are illegal.<sup>3</sup>

3. **WAGERING CONTRACTS.** A wagering contract is one in which one party for a consideration assumes a risk by promising to do something upon the happening of some future event, which is uncertain, or the time of which is uncertain, or upon the ascertainment of the existence of a present or past state of facts as to the existence of which there is a difference of opinion between the parties, unless the object of the contract is to indemnify the promisee against loss, or to insure the life, health, or safety of the promisee or of some one in whose life, health, or safety, he has an insurable interest, or to offer a reward for the exercise of strength, skill, or judgment. Wagers were not regarded as illegal at common law unless they led to indecent evidence, or were calculated to injure the rights or feelings of a third person, or to induce one to violate the law, or to interfere with the administration of the government.<sup>4</sup> In England the common law has been changed by various statutes. In this country the courts have generally treated all wagers as against public policy.<sup>5</sup> Two reasons for this doctrine are given:

<sup>1</sup> *Cartwright v. Cartwright*, 3 D. M. & G. 982; *Gaines v. Poor*, 3 Met. (Ky.) 503, 507; *Randall v. Randall*, 37 Mich. 563, 571.

<sup>2</sup> *Wilson v. Wilson*, 1 H. L. C. 538; *Fox v. Davis*, 113 Mass. 255.

<sup>3</sup> *Phillips v. Phillips*, 10 Or. 494; *Loveren v. Loveren*, 106 Cal. 509; 39 P. 801; *Cross v. Cross*, 58 N. H. 373; H. & W. 361.

<sup>4</sup> *Beadles v. Bless*, 27 Ill. 320.

<sup>5</sup> *Irwin v. Williar*, 110 U. S. 499; 4 S. Ct. 160; *Harvey v. Merrill*, 150 Mass. 1; 22 N. E. 49; W. 147; H. & W. 383.

first, that the time of the courts ought not to be taken up with settling idle bets;<sup>1</sup> second, that gambling is a vice, and wagers therefore immoral.<sup>2</sup> In the present state of public sentiment in this country the latter is the chief reason for holding wagers illegal.

Contracts for insurance are wagering contracts unless the insured has what is termed "an insurable interest in the property or person insured."<sup>3</sup> Contracts for "options" in commodities, that is, pretended sales for future delivery, in which the intention of the parties is not to deal in the commodity, but to perform the contract by paying the difference between the contract price and the actual price when the time for delivery arrives, are gambling contracts.<sup>4</sup> If one of the parties is innocent of any illegal intent, he can enforce the contract,<sup>5</sup> unless the statute provides otherwise.<sup>6</sup> A contract between principal and agent by which the latter is to make legal contracts for the sale or purchase of goods, but the principal is not to be required to deliver or receive any goods, but simply to settle with the agent by receiving or paying differences, has been sustained in England<sup>7</sup> and declared illegal in this country.<sup>8</sup>

<sup>1</sup> *Love v. Harvey*, 114 Mass. 80; H. & W. 324.

<sup>2</sup> *Bernard v. Taylor*, 23 Or. 416; 31 P. 968.

<sup>3</sup> *King v. State Mut. Ins. Co.*, 7 Cush. 1, 10; *Warnock v. Davis*, 104 U. S. 775; H. & W. 333.

<sup>4</sup> *Harvey v. Merrill*, *supra*; *Bona's Appeal*, 55 Pa. St. 294; *White v. Barber*, 123 U. S. 392; 8 S. Ct. 221; *Mohr v. Miesen*, 47 Minn. 228; 49 N. W. 862; H. & W. 325.

<sup>5</sup> *Frost v. Clarkson*, 7 Cow. 24; *Pixley v. Boynton*, 79 Ill. 351; W. 155.

<sup>6</sup> As in Missouri; *Connor v. Black*, 119 Mo. 126; 24 S. W. 184; and in Tennessee; *McGrew v. City Produce Exchange*, 85 Tenn. 572; 4 S. W. 38.

<sup>7</sup> *Thacker v. Hardy*, 4 Q. B. D. 685; W. 132.

<sup>8</sup> *Harvey v. Merrill*, *supra*; *Mohr v. Miesen*, *supra*; *Embrey v. Jemison*, 131 U. S. 336; 9 S. Ct. 776; *Flagg v. Baldwin*, 38 N. J. Eq. 219.

In England wagers were not illegal at common law, and as the contract between principal and agent did not violate the statute the contract was held good. In this country, wagers being illegal in their very nature, the contract between principal and agent is tainted by the illegality of the principal's intention to speculate. A distinction has been drawn between the case of principal and agent and the case of customer and broker,<sup>1</sup> but this distinction seems of doubtful validity.<sup>2</sup> If there is a mere expectation on the part of the principal and broker that the persons from whom stocks are bought or to whom stocks are sold will be willing to settle the transactions by the payment of differences, there is no illegality in the contract even in this country.<sup>3</sup>

The ordinary contracts which are made on the Board of Trade, the Stock Exchange, and in similar places, are not gambling contracts, but simple purchases and sales for future delivery.<sup>4</sup> The American decisions in the cases above cited of contracts between principal and agent are to be supported not on the ground that the agent is employed to make an unlawful contract, but on the ground that the unlawful intention of the principal to speculate, known to the agent, taints the contract between them.

The offer of a reward for the exercise of strength, speed, skill, or judgment is not a wager.<sup>5</sup> But if A. and B. put up a purse of \$100 in C.'s hands, the entire amount to go to the one whose horse shall win in a given

<sup>1</sup> *Markham v. Jandon*, 41 N. Y. 235, 256; *Flagg v. Baldwin*, *supra*.

<sup>2</sup> *Mohr v. Miesen*, *supra*.

<sup>3</sup> *Barnes v. Smith*, 159 Mass. 344; 34 N. E. 403.

<sup>4</sup> *Bibb v. Allen*, 149 U. S. 481; 13 S. Ct. 950.

<sup>5</sup> *Harris v. White*, 81 N. Y. 532; *Alvord v. Smith*, 63 Ind. 58; *Delier v. Agricultural Society*, 57 Ia. 481; 10 N. W. 872; *Porter v. Day*, 71 Wis. 296; 37 N. W. 259.

race, this constitutes a wager.<sup>1</sup> As to the effect of a race which is run for stakes consisting of the entrance fees paid by each contestant, it has been held that there is no illegality in such a contest,<sup>2</sup> but it seems hard to reconcile this doctrine with the preceding rule. It would seem that a distinction might be drawn between cases where the stakes are made up of the entrance fees, and cases where a prize is offered and the entrance fees are charged simply to cover the expenses of the race.

A contract to furnish goods to two persons is not rendered illegal by the fact that the two vendees have made a bet as to which should pay for the goods.<sup>3</sup>

A contract to pay a certain sum for property purchased, and to pay more if some subsequent event tending to increase its value shall occur, is valid.<sup>4</sup> And a contract between the vendor and the vendee of a tract of land which was supposed at the time of the sale to contain a certain number of acres, that the land shall be surveyed, and that the vendor should pay the vendee so much per acre in case of a deficiency, while in case of an excess the vendee should pay the vendor the same amount per acre, has been sustained;<sup>5</sup> though no point was made as to the wagering character of the transaction.

(b) *Contracts tending to Limit Necessary Individual Freedom.* — Every contractual obligation limits the freedom of action of the party on whom that obligation is imposed. Now although the law is very liberal in allowing persons to make what contracts they choose,

<sup>1</sup> *Diggle v. Higgs*, 2 Ex. D. 422; overruling *Batty v. Marriott*, 5 C. B. 818; *Trimble v. Hill*, 5 A. C. 342; *Gibbons v. Gouverneur*, 1 Denio, 170.

<sup>2</sup> *Harris v. White*, 81 N. Y. 532.

<sup>3</sup> *Winchester v. Nutter*, 52 N. H. 507; W. 157.

<sup>4</sup> *Ferguson v. Coleman*, 3 Richardson (Law), 99; W. 160.

<sup>5</sup> *Seward v. Mitchell*, 1 Coldwell, 87; W. 554.

there are certain matters in regard to which it is deemed by the courts that the public welfare requires individual action to remain untrammelled by contractual obligation. Under this head came contracts affecting the freedom of marriage, of testamentary disposition, and of trade; and contracts depriving an individual of rights with which public policy requires he should not part.

1. **CONTRACTS AFFECTING FREEDOM OF MARRIAGE.**

— A contract may be illegal either because it restrains the freedom of the individual to marry, or because it contemplates the use of influence to bring about a marriage for a pecuniary consideration. A contract to marry a particular person is good, of course;<sup>1</sup> but a contract not to marry,<sup>2</sup> or a contract tending to prevent marriage within a given time,<sup>3</sup> or a contract to marry no one but A. is void.<sup>4</sup> Marriage brokerage contracts are also void, because they tend to bring about marriages by means of influence which is moved by pecuniary considerations.<sup>5</sup>

It has been held that an agreement by a husband to pay his wife a certain sum if she would not sue for divorce is illegal,<sup>6</sup> but this decision seems questionable. It would seem that public policy is subserved rather than antagonized by such an agreement.

2. **CONTRACTS AFFECTING FREEDOM OF TESTAMENTARY DISPOSITION.** — Contracts to procure a third person to make a will in favor of a particular person or object, or to use influence to procure such testamentary disposition

<sup>1</sup> *Holt v. Ward* Clarendieux, 2 Strange, 937; L. 397.

<sup>2</sup> *Low v. Peers*, Wilmot, 371.

<sup>3</sup> *Chalfant v. Payton*, 91 Ind. 202; *White v. Equitable Union*, 76 Ala. 251. These were also wagering contracts.

<sup>4</sup> *Low v. Peers*, *supra*.

<sup>5</sup> *Cole v. Gibson*, 1 Ves. Sr. 503; *Johnson v. Hunt*, 81 Ky. 321.

<sup>6</sup> *Merrill v. Peaslee*, 146 Mass. 460; 16 N. E. 271. Three judges dissented.



are illegal.<sup>1</sup> But a contract whereby one person binds himself to make a certain will is valid.<sup>2</sup>

3. CONTRACTS IN RESTRAINT OF TRADE.—Contracts in restraint of trade may be illegal as against public policy either because they tend to prevent individuals from earning their living by working in a given way, or because they tend to destroy competition, and thereby subject the public to the extortions of monopolies. The subject of contracts in restraint of trade is one of vast importance, but legislation is constantly altering the common law.

As has already been seen, contracts in restraint of trade require consideration even though under seal, but the adequacy of the consideration is of no more importance than in the case of other contracts.<sup>3</sup>

A contract by which a person agrees never to engage in a certain business is void.<sup>4</sup> If the contract is limited, however, in its restraint of trade, and the restraint is reasonably necessary for the protection from competition of the promisee, the contract is valid. It was formerly held that if the restraint extended throughout a State, it was unreasonable, and the contract void;<sup>5</sup> but the later cases take a different view, and recognize no arbitrary limitations as to space.<sup>6</sup> As to whether a restraint can be reasonable which is limited in time but

<sup>1</sup> *Debenham v. Ox*, 1 Ves. Sr. 276.

<sup>2</sup> *Robinson v. Ommanney*, 23 C. D. 285; *Logan v. McGinniss*, 12 Pa. St. 27.

<sup>3</sup> *Hitchcock v. Coker*, 6 A. & E. 438.

<sup>4</sup> *Davies v. Davies*, 36 C. D. 359; *W. 77*; *Alger v. Thacher*, 19 Pick. 51.

<sup>5</sup> *Wright v. Ryder*, 36 Cal. 342; *Taylor v. Blanchard*, 13 Allen, 370.

<sup>6</sup> *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Herrshoff v. Boutineau*, 17 R. I. 3; 19 A. 712; *W. 95*; *Diamond Match Co. v. Roerber*, 106 N. Y. 473; 13 N. E. 419; *W. 112*; *H. & W. 362*.

unlimited as to space the authorities differ. It was formerly thought in England that the restraint must be limited as to space, in any case, but after some wavering<sup>1</sup> the law is now settled to the contrary.<sup>2</sup> In this country there are authorities to the effect that a contract in restraint of trade is void if unlimited as to space.<sup>3</sup> The tendency of the later cases, however, is in accord with the latest decisions in England; reasonableness is the sole test of the validity of the restraint, and a restraint unlimited as to space is not necessarily unreasonable.<sup>4</sup>

It has been held in Illinois that the only contracts in restraint of trade which the law will enforce are contracts in which the vendor of a business, or an employee therein, agrees not to enter into competition with his vendee or employer.<sup>5</sup> The law in regard to agreements made for the purpose of preventing competition is in an unsettled state. It is clear that an attempt to "corner" the market is illegal.<sup>6</sup> Agreements tending to create a monopoly of staple articles of commerce,<sup>7</sup> or of any article of necessity, are also undoubtedly

<sup>1</sup> *Davies v. Davies*, *supra*.

<sup>2</sup> *Rousillon v. Rousillon*, 14 C. D. 351; W. 70; *Badische Anilin Fabrik v. Schott*, (1892) 3 Ch. 447; W. 93; *Nordenfelt v. Maxim-Nordenfelt Co.*, (1894) A. C. 535.

<sup>3</sup> *Bishop v. Palmer*, 146 Mass. 469; 16 N. E. 299; W. 104; *H. & W. 380*; *Lange v. Werk*, 2 Ohio St. 519; *Wright v. Ryder*, *supra*; *Taylor v. Blanchard*, *supra*.

<sup>4</sup> *Consumers' Oil Co. v. Nunnemaker*, 41 N. E. 1048; — Ind. —; *Diamond Match Co. v. Roeber*, *supra*; *Oakdale Mfg. Co. v. Garst*, 28 A. 793; — R. I. —; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409; 9 S. Ct. 553; *Fowle v. Park*, 131 U. S. 88; 9 S. Ct. 658; *Ellerman v. Chicago Junction Ry. Co.*, 49 N. J. Eq. 217; 23 A. 287.

<sup>5</sup> *More v. Bennett*, 140 Ill. 69; 29 N. E. 888; W. 120.

<sup>6</sup> *Samuels v. Oliver*, 130 Ill. 73; 22 N. E. 499.

<sup>7</sup> *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 24 N. E. 660; W. 124; *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; 29 A. 102.

illegal.<sup>1</sup> Whether the mere fact that an agreement is intended to prevent competition renders it illegal is unsettled. It is held on the one hand, in Massachusetts, that since undue competition is injurious to the public, an agreement limiting such competition is valid.<sup>2</sup> The business in that case was the manufacture and sale of shade-rollers. In New York it has been held that agreements entered into for the purpose of enhancing the price of coal<sup>3</sup> and of mutton<sup>4</sup> are unlawful. It has also been held that an agreement to control the price of milk is unlawful, though the agreement was formed by dealers in order to reduce the price. "The price was fixed," says the court, "for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and at their option to enhance the price to be paid by the consumers."<sup>5</sup> In Illinois a combination of stenographers to fix a uniform scale of payment for their work has been held illegal,<sup>6</sup> a decision which places all trades-unions under the ban of the law. No principles can be stated which will harmonize the varying decisions, but it seems that public policy ought to be satisfied with the rule that agreements in restraint of trade are valid if reasonable; that it makes no difference what the nature of such agreements may be; whether between vendor and

<sup>1</sup> Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass. 50; 35 N. E. 98; W. 108; Judd v. Harrington, 139 N. Y. 105; 34 N. E. 790.

<sup>2</sup> Central Shade Roller Co. v. Cushman, 143 Mass. 353; 9 N. E. 629; W. 99.

<sup>3</sup> Arnot v. Coal Co., 68 N. Y. 558; People v. Sheldon, 139 N. Y. 251; 34 N. E. 785.

<sup>4</sup> Judd v. Harrington, *supra*.

<sup>5</sup> People v. Milk Exchange, 145 N. Y. 267; 39 N. E. 1062.

<sup>6</sup> More v. Bennett, *supra*.

vendee, employer and employee, or between different employers on the one hand,<sup>1</sup> and different employees on the other.<sup>2</sup> Such a statement of the law seems in accordance with the best authorities; but so dominant has been the Manchester school of political economy that competition is still regarded by some courts as an unmixed blessing, and any interference with it as illegal.

4. CONTRACTS TO SURRENDER CERTAIN RIGHTS. — The attempted surrender of rights which public policy requires should not be surrendered is ineffectual. Thus in some States it is held that a debtor cannot waive the statutory exemptions in his favor.<sup>3</sup> So a mortgagor cannot waive his equity of redemption.<sup>4</sup>

It is against public policy that persons pursuing public vocations, such as common carriers, telegraph companies, and others, should impose unreasonable terms upon those who employ them. The freedom of contract allowed to others is restricted in the case of those pursuing public vocations, for the reason that the undertaking of a public vocation imposes duties which can be avoided by contract only to a reasonable extent.<sup>5</sup> The nature and extent of such duties is beyond the scope of this work.

A contract by which one party seeks to prevent himself from recovering damages for a future tort is against public policy and void.<sup>6</sup> But a contract that if the

<sup>1</sup> As in *Central Shade Roller Co. v. Cushman*, *supra*.

<sup>2</sup> *Collins v. Locke*, 4 A. C. 674; W. 62; *Commonwealth v. Hunt*, 4 Met. 111; *Snow v. Wheeler*, 113 Mass. 179; *Longshore Printing Co. v. Howell*, 26 Or. 527; 38 P. 547.

<sup>3</sup> *Kneetle v. Newcomb*, 22 N. Y. 249; *contra*, *Shelly's Appeal*, 36 Pa. St. 373.

<sup>4</sup> *Bayley v. Bailey*, 5 Gray, 505.

<sup>5</sup> See *Greenhood*, Public Policy, Part X., ch. 2.

<sup>6</sup> *Hayes v. Hayes*, 8 La. Ann. 468; *Roesner v. Hermann*, 8 F. 783.

employee of a railway company shall accept the benefit of insurance in a company to which the railway company contributes, his right of action against the railway company for damages caused by an accident shall be discharged, is binding.<sup>1</sup> The contract in such case does not bar the right of action; it is the acceptance of the insurance which discharges it.

### § 3. General Rules as to Illegality.

Having seen what classes of contracts the law regards as illegal, we have now to consider certain general rules as to the nature and effect of illegality.

(a) *Object Unlawful*.— When the object of an agreement is the accomplishment of an unlawful purpose, the agreement is of course unlawful.

(b) *Consideration Illegal*.— When the consideration for a promise is illegal, the contract is illegal.<sup>2</sup>

(c) *Contract Legal, Intention Innocently Illegal*.— When a contract can be legally performed, and there is an intention on the part of the parties to perform it in an illegal manner, the performance of the contract in a legal manner will be enforced if the parties contracted in ignorance of the law and with no intention of violating it.<sup>3</sup>

(d) *Tendency Illegal*.— If the tendency of the contract is to accomplish an illegal result, or a legal result by illegal means, the contract is illegal.<sup>4</sup> Thus where there was printed on the back of a lottery ticket an offer of a reward to any person who would produce a ticket

<sup>1</sup> *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44; 62 N. W. 314.

<sup>2</sup> *Featherston v. Hutchinson*, Cro. Eliz. 199.

<sup>3</sup> *Wagh v. Morris*, L. R. 8 Q. B. 202; W. 257.

<sup>4</sup> *Egerton v. Earl Brownlow*, 4 H. L. C. 1 (not a contract case); *Richardson v. Crandall*, 48 N. Y. 348, 362; *Holladay v. Paterson*, 5 Or. 177, 180.

that had drawn a prize and not been promptly cashed, it was held that the offer could not be enforced.<sup>1</sup>

An agreement to indemnify one against the consequences of an illegal act is illegal,<sup>2</sup> unless it appears that there is no intention to commit such illegal act. Where A. agreed to publish a book to be written by B., and B. agreed to hold A. harmless from all libel suits, the agreement was held valid because it did not appear that there was any intention to publish libellous matter.<sup>3</sup>

(e) *Intention of One Party Illegal.*—Where the contract is to do a thing lawful in itself, but where the intention of one party is to accomplish an unlawful object,<sup>4</sup> or where some fact known to one party and not to the other renders the performance of the contract unlawful,<sup>5</sup> the innocent party may recover damages against the other for breach of contract, and may refuse to perform the contract on discovering the illegal intention of the other party.<sup>6</sup>

(f) *Vendee's Intention Illegal.*—When property is sold "with a view" to an illegal use, the transaction is illegal.<sup>7</sup>

When property is sold with knowledge by the vendor that the vendee intends to use it "for the perpetration of a heinous crime," the transaction is illegal.<sup>8</sup>

When the vendor has knowledge of the illegal inten-

<sup>1</sup> Dieckhoff v. Fox, 56 Minn. 438; 57 N. W. 930.

<sup>2</sup> Babcock v. Terry, 97 Mass. 482.

<sup>3</sup> C. F. Jewett Publishing Co. v. Butler, 159 Mass. 517; 34 N. E. 1087; W. 245.

<sup>4</sup> Pixley v. Boynton, 79 Ill. 351; W. 155.

<sup>5</sup> Millward v. Littlewood, 5 Ex. 775; W. 255.

<sup>6</sup> Cowan v. Milbourn, L. R. 2 Ex. 230; W. 235; Church v. Proctor, 66 F. 240; — U. S. App. —.

<sup>7</sup> Webster v. Munger, 8 Gray, 584; Graves v. Johnson, 156 Mass. 211; 30 N. E. 818; H. & W. 391.

<sup>8</sup> Hanauer v. Doane, 12 Wall 342

tion of the vendee, and aids him in any way in the accomplishment of his unlawful purpose, he cannot enforce payment for the property.<sup>1</sup>

When the vendor knows that the vendee intends to use the property for an illegal purpose other than the commission of "a heinous crime," there is a conflict of authority as to the right of the vendor to enforce payment for the property. It is held in England that the vendor's knowledge of the vendee's illegal intention renders the transaction illegal.<sup>2</sup> In this country the opposite rule prevails.<sup>3</sup> If knowledge on the part of the vendor of the vendee's illegal purpose is insufficient to render the contract illegal, *à fortiori*, reasonable cause to know of such intention is insufficient.<sup>4</sup>

(g) *Borrower's Intention Illegal.* — Where money is loaned for the purpose of accomplishing an illegal object, the contract is illegal, and the money cannot be recovered.<sup>5</sup> It seems that the rules as to the effect of the lender's knowledge of the borrower's illegal intention are the same as in the case of a vendor's knowledge of his vendee's illegal intention.<sup>6</sup>

(h) *Illegal and Void Contracts.* — It is important to notice here a distinction between two classes of contracts, both of which are ordinarily called illegal.

<sup>1</sup> Gaylord v. Soragen, 32 Vt. 110; Foster v. Thurston, 11 Cush. 322; Wamell v. Reed, 5 T. R. 599; Aiken v. Blaisdell, 41 Vt. 655; W. 264.

<sup>2</sup> Pearce v. Brooks, L. R. 1 Ex. 213; W. 231.

<sup>3</sup> Green v. Collins, 3 Cliff. 494; Dater v. Earl, 3 Gray, 482; Anheuser-Busch Br'g Ass'n v. Mason, 44 Minn. 318; 46 N. W. 558; Delavina v. Hill, 65 N. H. 94; 19 A. 1000.

<sup>4</sup> Adams v. Coulliard, 102 Mass. 167.

<sup>5</sup> Cannan v. Bryce, 3 B. & Ald. 179; M'Kinnell v. Robinson, 3 M. & W. 435.

<sup>6</sup> Tyler v. Carlisle, 79 Me. 210; 9 A. 356; W. 249; H. & W. 390; Howell v. Stuart, 54 Mo. 400; Armstrong v. American Exchange Bank, 133 U. S. 433; 10 S. Ct. 450.

External limitations upon freedom of contract are imposed by the law either because the object of the contract is the accomplishment of some purpose which the law regards as injurious to the public welfare, or because the contract is one which the law does not deem it proper to enforce, although the accomplishment of the object of the contract is not regarded as against public policy. In the former case the contract is always called illegal; in the latter case it is sometimes called illegal, and sometimes simply void. In so far as the contract itself is concerned the distinction is of little consequence. So long as no contractual obligation results from the acts of the parties it matters little for what reason the law refuses to recognize the validity of the contract. Nevertheless, the distinction in question has most important results. If the contract is merely one which the law refuses to enforce, the invalidity of the contract does not affect other transactions or other rights and obligations; but if an unlawful object is contemplated, the illegality of such object is sufficient to taint other transactions not otherwise illegal. The distinction in question is well illustrated by the different views taken of wagers in this country and in England. In this country wagers are regarded as detrimental to public morality. It follows, therefore, not merely that wagering contracts are illegal, but also that other contracts are rendered illegal when the object of such contracts is to accomplish a purely speculative purpose.<sup>1</sup> In England, on the other hand, wagers are declared void by statute; but they are not regarded in general as immoral or unlawful transactions. It follows, accordingly, that in England, while the wagering contract is

<sup>1</sup> *Harvey v. Merrill*, 150 Mass. 1; 22 N. E. 49; W. 147; H. & W. 383; *Embrey v. Jemison*, 131 U. S. 336; 9 S. Ct. 776; *Mohr v. Miesen*, 47 Minn. 228; 49 N. W. 862; H. & W. 325.



invalid, other contracts which do not come within the prohibition of the statute are sustained, even though their object is purely speculative.<sup>1</sup> In considering the effect of illegality, therefore, on other rights and obligations of the parties than those springing from the contract itself, it is always necessary to bear in mind this distinction between contracts whose object is unlawful, and contracts which the law simply refuses to enforce. It seems that all contracts void as against public policy at common law are illegal,<sup>2</sup> and that all contracts which the courts think the legislature intended to prohibit are illegal, in the strict sense; but that the mere fact that the contract is declared by the legislature to be void does not render it illegal unless the legislative intention is to prohibit the making of the contract.<sup>3</sup>

(i) *Securities for Illegal Contracts.* — All securities given for money due or to become due on illegal transactions are themselves illegal contracts;<sup>4</sup> but a bond to secure the payment of money due on a contract that is merely void is valid.<sup>5</sup>

(j) *Effect of Illegality.* — The courts will never lend their aid to enforce an illegal contract; nor will they allow an illegal contract to be set up as a defence to an action on a legal obligation,<sup>6</sup> but the illegality of a contract apparently legal may be shown to defeat an action on such contract.<sup>7</sup>

The courts will not assist a party who seeks their aid

<sup>1</sup> *Thacker v. Hardy*, 4 Q. B. D. 685; W. 132.

<sup>2</sup> *Harvey v. Merrill*, *supra*; *Bishop v. Palmer*, 146 Mass. 469; 16 N. E. 299; W. 104; H. & W. 380.

<sup>3</sup> *Thacker v. Hardy*, *supra*.

<sup>4</sup> *Tillock v. Webb*, 56 Me. 100; W. 248; *Fisher v. Bridges*, 3 E. & B. 642.

<sup>5</sup> *Ayerst v. Jenkins*, 16 Eq. 275.

<sup>6</sup> *Ackert v. Barker*, 131 Mass. 436; W. 165; H. & W. 354.

<sup>7</sup> *Frost v. Gage*, 3 Allen, 560; W. 241.

to avoid an illegal contract where he is himself at fault. The legal maxim is, "*In pari delicto potior est conditio defendentis.*"<sup>1</sup> This rule, however, is not an absolute one, and its limitations are not entirely clear. The rule proceeds on the ground that it is contrary to public policy that the courts should interfere, not only to enforce illegal contracts, but also to assist in any way the parties who have made such contracts. The rule requires that the parties shall be *in pari delicto*. If, therefore, one of the parties has been persuaded to enter into the illegal contract by the fraud, oppression, or undue influence of the other, the rule does not apply, and the party who is relatively innocent can call upon the court to relieve him from the consequences of his act.<sup>2</sup>

Inasmuch as the object of the foregoing rule is to protect the public interest, the courts will not apply the rule where their interference will tend to prevent the accomplishment of the illegal purpose. If money is paid on goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back whenever such recovery will tend to defeat the illegal object of the contract.<sup>3</sup> This rule is frequently applied in cases of wagers, where either party is allowed to recover the money he has deposited with a stake-holder at any time before it has

<sup>1</sup> St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393; 12 S. Ct. 953. The maxim in that case was applied to an *ultra vires* contract of a corporation.

<sup>2</sup> Williams v. Bayley, L. R. 1 H. L. 200; W. 177; Atkinson v. Denby, 7 H. & N. 934; Reynell v. Sprye, 1 D. M. & G. 660; Prewett v. Coopwood, 30 Miss. 369; Bell v. Campbell, 123 Mo. 1; 25 S. W. 359; Duval v. Wellman, 124 N. Y. 156; 26 N. E. 343; H. & W. 402.

<sup>3</sup> Duval v. Wellman, *supra*; Bernard v. Taylor, 23 Or. 416; 31 P. 968; H. & W. 407.

been paid over.<sup>1</sup> So when A. makes a fictitious assignment of goods for the purpose of defrauding his creditors, he may recover the goods from his assignee before anything has been done to defraud his creditors.<sup>2</sup> In such cases there is said to be a *locus pœnitentiæ*. If, however, the illegal object has been actually accomplished by the payment of the money or the delivery of the goods, the money or goods cannot be recovered. Thus if A. deposits money with B. in order to indemnify B. for going bail for him, he cannot recover the money from B., even though the time for which the bail-bond was given has not yet expired. The illegal purpose is accomplished by the simple deposit of the money, which deprives the public of the interest which the surety would otherwise have to prevent the forfeiture of the bond.<sup>3</sup> So when A. deposits money in a bank in B.'s name in order to give B. a fictitious credit, he cannot recover the money after B. becomes insolvent, since the illegal purpose has been accomplished.<sup>4</sup> Part accomplishment of the illegal purpose will destroy any *locus pœnitentiæ* that might otherwise exist.<sup>5</sup> If the illegal agreement has been abandoned before the accomplishment of any part of the illegal purpose, one who has paid money thereunder can recover the money.<sup>6</sup>

It is sometimes said that a party can recover money paid on an illegal contract whenever the illegal purpose has not been accomplished; but the true test is not the accomplishment or non-accomplishment of the illegal

<sup>1</sup> *Bernard v. Taylor*, 23 Or. 416; 31 P. 968; H. & W. 407; *Hampden v. Walsh*, 1 Q. B. D. 189; W. 126.

<sup>2</sup> *Taylor v. Bowers*, 1 Q. B. D. 291.

<sup>3</sup> *Herman v. Jeuchner*, 15 Q. B. D. 561.

<sup>4</sup> *Re Great Berlin Steamboat Co.*, 26 C. D. 616.

<sup>5</sup> *Kearley v. Thomson*, 24 Q. B. D. 742.

<sup>6</sup> *Spring Co. v. Knowlton*, 103 U. S. 49.

purpose, but the actual effect of the restoration of the money.<sup>1</sup> Thus if money is paid to induce one to commit a crime, to allow the recovery of the money before the commission of the crime would tend to induce the recipient of the money to commit the crime, and thereby insure the retention of the money; while if A. were to transfer a ship to B. in order that B. might commit piracy, to allow A. to recover the ship would tend to prevent the crime by depriving B. of the means of committing piracy.<sup>2</sup>

(k) *Receipt of Proceeds of Illegal Transaction.* — Where there is an illegal contract of agency or partnership no accounting will be decreed, either of profits or losses.<sup>3</sup> But where money is paid or goods delivered to A. for the use of B., A. must account for the money or goods, although they were received as the proceeds of an illegal transaction.<sup>4</sup> Theoretically, there is a distinction between enforcing the illegal contract and enforcing a duty not springing from the contract, but arising solely from the receipt of the money or goods. Practically it seems impossible to reconcile the actual decisions on this point, though the rules laid down are those just stated.

Where the profits of an illegal transaction have been actually divided or invested in other property the illegality of the original transaction in no way affects the

<sup>1</sup> *Duval v. Wellman*, 124 N. Y. 156; 26 N. E. 343; H. & W. 402.

<sup>2</sup> *Anson, Contracts* (4th ed.), 200.

<sup>3</sup> *Wheeler v. Sage*, 1 Wall. 518; *Bartle v. Nutt*, 4 Pet. 184; *Craft v. McConoughy*, 79 Ill. 346; *Jackson v. McLean*, 100 Mo. 130; 13 S. W. 393; *Ibid.*, 36 F. 213.

<sup>4</sup> *Lindley, Partnership*, I. 107; *Evans v. Trenton*, 24 N. J. L. 764; *Sharp v. Taylor*, 2 Ph. 801; *Planters' Bank v. Union Bank*, 16 Wall. 483; *Martin v. Richardson*, 94 Ky. 183; 21 S. W. 1039; *contra*, *Lemon v. Grosskopf*, 22 Wis. 447.

title to such property or subsequent dealings in regard to it.<sup>1</sup>

(1) *Partial Illegality.*—An agreement may consist of several distinct and independent contracts contained in one instrument. In such case the connection between the different contracts is physical, not legal; and the illegality of one contract will not affect the validity of another unless they are connected with each other in such a way that the illegality of one contract must taint the other.

Where security is given for a debt, and that security is in the form of an instrument which is prevented from accomplishing its intended result by the operation of some positive rule of law, though the security itself be void, a covenant or agreement to pay the debt, contained in such instrument, will be upheld.<sup>2</sup> Thus where a rent-charge created by a vicar was illegal and void, a personal covenant to pay the amount of the rent-charge contained in the same instrument was held binding.<sup>3</sup> So where a mortgage given by a corporation was *ultra vires*, a covenant in the mortgage to repay the money borrowed was enforced.<sup>4</sup>

Where an agreement is lawful and complete on its face, and another agreement is made supplemental to the first, and substantially a part of the same transaction, which second agreement is unlawful, the law will enforce the first agreement in spite of the illegality of the second.<sup>5</sup>

<sup>1</sup> *Brooks v. Martin*, 2 Wall. 70.

<sup>2</sup> *Kerrison v. Cole*, 8 East, 231; *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235.

<sup>3</sup> *Monys v. Leake*, 8 T. R. 411.

<sup>4</sup> *Payne v. Brecon*, 3 H. & N. 572.

<sup>5</sup> *Odessa Tramways Co. v. Mendel*, 8 C. D. 235; *Ohio v. Board of Education*, 35 Ohio St. 519.

Where an instrument operates upon two classes of property, as to one of which the instrument is illegal, or void for want of compliance with some legal requirement, while in regard to the other class of property the instrument would be valid, the instrument will be upheld as to that kind of property upon which it may lawfully operate. Thus where a debtor made an assignment of his goods and book-debts, which was void as to the goods for want of the registration required by law, the assignment was held valid as to the book-debts.<sup>1</sup> So in Louisiana, where a husband gave his wife a *dation en paiement* of land and movables, which were valued separately, the *dation*, though void as to the land was upheld as to the movables, by reason of the separate valuation.<sup>2</sup>

Where the consideration for a promise is in part illegal, the entire contract is illegal.<sup>3</sup>

In a dictum in *Pigot's Case*,<sup>4</sup> it was resolved by the judges, "that if some of the covenants of an indenture, or some of the conditions indorsed upon a bond are against law, and some good and lawful; that in this case the covenants or conditions which are against law

<sup>1</sup> *Kitching v. Hicks*, 6 Ont. Rep. 739.

<sup>2</sup> *Glaze v. Dnson*, 40 La. Ann. 692; 4 S. 861.

<sup>3</sup> *Featherston v. Hutchinson*, Cro. Eliz. 199; *Carleton v. Whitcher*, 5 N. H. 196; *Foley v. Speir*, 100 N. Y. 552; 3 N. E. 477; *Bixby v. Mow*, 51 N. H. 402; H. & W. 378; *Filson v. Himes*, 5 Pa. St. 452; *Perkins v. Cummings*, 2 Gray, 258; *Snyder v. Willey*, 33 Mich. 483; *Widoe v. Webb*, 20 Ohio St. 431; *McQuade v. Rosecrans*, 36 Ohio St. 442; *Deering v. Chapman*, 22 Me. 438; *Cetten v. McKenzie*, 57 Miss. 418; *Pacific Guano Co. v. McMullen*, 66 Ala. 582; *Carleton v. Woods*, 28 N. H. 290; *Pueblo R. R. Co. v. Taylor*, 6 Col. 1; *Bishop v. Palmer*, 146 Mass. 469; 16 N. E. 299; W. 104; H. & W. 380; *Luce v. Foster*, 42 Neb. 818; 60 N. W. 1027; *contra*, *Yundt v. Roberts*, 5 S. & R. 139. And see *Hynds v. Hays*, 25 Ind. 31.

<sup>4</sup> 11 Co. Rep. 27 b.

are void *ab initio*, and the others stand good." From this *dictum* has sprung the generally accepted doctrine that where there is a promise to do two things, one of which is legal and the other illegal, the promise to do the legal act will be enforced, and the illegal act will be disregarded.<sup>1</sup> At one time it was supposed that there was a difference between partial illegality due to a prohibitory statute, and partial illegality at common law. It is now recognized, however, that there is no such difference, except where a statute expressly declares that any instrument containing an agreement which it prohibits shall be void.<sup>2</sup>

The United States Supreme Court has said that "where there is no imputation of *malum in se*, the bad parts (of a contract) do not affect the good. The valid may be enforced."<sup>3</sup> The exact force of the qualification that there must be no imputation of *malum in se* is not quite clear. If the covenants or agreements are clearly separable, it is hard to see how one illegal agreement can under any circumstances impute *malum in se* to the entire contract; while, of course, if the legal part of the contract cannot be separated from the illegal part, the contract must fail in any case.

Under the rule in *Pigot's Case*, as developed by the modern authorities, it makes no difference whether there be two distinct promises, or whether there be one promise which is divisible; nor does it matter whether the consideration for the two promises be an entire con-

<sup>1</sup> *Bank of Australasia v. Breillat*, 6 Moore P. C. 201; *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *U. S. v. Bradley*, 10 Pet. 343; *Gelpke v. Dubuque*, 1 Wall. 221. If the promise is indivisible, the whole contract is of course illegal. *Consumers' Oil Co. v. Nunne-maker*, 41 N. E. 1048; — Ind. —.

<sup>2</sup> *Pickering v. Ilfracombe Ry. Co.*, *supra*.

<sup>3</sup> *Gelpke v. Dubuque*, *supra*.

sideration or an apportionable one.<sup>1</sup> One of the most common instances of the application of this rule is in the case of agreements in restraint of trade. Where an agreement imposes restrictions upon trade which are unreasonable and exceed the limits allowed by law, if the unreasonable part of the restriction can be separated from that which is reasonable, the agreement will be enforced within such reasonable limits. Thus where it was agreed between A. and B. that A. should become assistant to B. in his business of surgeon dentist for four years, that B. should instruct A. in the business, and that at the expiration of the term A. should not carry on that business in London, or in any of the towns in England and Scotland where B. might have been practising before the expiration of said service; it was held that the covenant in restraint of trade was unreasonably broad, but that being divisible, it was binding on A. as far as practising in London was concerned.<sup>2</sup>

The reasoning in these cases is, that the covenant in restraint of trade, if divisible, is equivalent to two distinct covenants, one of which is legal and the other illegal, and that therefore, under the rule in *Pigot's Case*,<sup>3</sup> the illegal covenant should be disregarded, and the legal covenant enforced. In California, however, this reasoning is disapproved where the covenant sued on, though divisible, is yet founded upon an entire con-

<sup>1</sup> *Greenwood v. Bishop of London*, 5 Taunt. 727; *Newman v. Newman*, 4 M. & S. 66; *Presbury v. Fisher*, 18 Mo. 50; *Erie Ry. Co. v. Union Locomotive Co.*, 35 N. J. L. 240; H. & W. 373.

<sup>2</sup> *Mallan v. May*, 11 M. & W. 652; *Chesman v. Nainbry*, 2 Strange, 739; 2 Lord Raym. 1456; *Dean v. Emerson*, 102 Mass. 480; *Peltz v. Eichele*, 62 Mo. 171; *Smith's Appeal*, 113 Pa. St. 579; 6 A. 251; *Western Union Tel. Co. v. B. & S. Ry. Co.*, 3 McCrary, 130; *Oregon St. Nav. Co. v. Winsor*, 20 Wall. 64.

<sup>3</sup> 11 Co. Rep. 27 b.



sideration.<sup>1</sup> And in North Carolina the rule in *Pigot's Case* is not followed where the consideration for the divisible promise is not apportionable.<sup>2</sup>

In applying the rule in *Pigot's Case* most courts have been led into decisions which are plainly inconsistent. In consideration of X., A. promises B. to do two acts, M. and N., of which M. is legal and N. illegal. If X. is an executory consideration, that is, a promise, such promise is void because the consideration for it, viz.: A.'s promise to do M. and N. is partly illegal. But mutual promises are the consideration for each other, so that as B.'s promise is not binding, A.'s promise is not binding. Yet if A.'s promise is under seal, or if X. is an executed consideration, the courts generally hold that A.'s promise to do M. is enforceable. In California<sup>3</sup> and North Carolina,<sup>4</sup> however, a different view is taken, and when there is one entire consideration for two promises, and one promise is for the performance of an illegal act, the entire contract is illegal. This seems a more logical view, since it recognizes the distinction between a divisible promise and a divisible contract, as most courts fail to do.

The inconsistency just pointed out has led the Indiana courts to hold that if the consideration is divisible, the promise, though entire, will be enforced to the extent of the legal consideration, though part of the consideration is illegal.<sup>5</sup>

<sup>1</sup> *More v. Bonnet*, 40 Cal. 251.

<sup>2</sup> *Lindsay v. Smith*, 78 N. C. 328.

<sup>3</sup> *More v. Bonnet*, *supra*.

<sup>4</sup> *Lindsay v. Smith*, *supra*.

<sup>5</sup> *Hynds v. Hays*, 25 Ind. 31. For a further discussion of partial illegality, see 1 *Northwestern Law Rev.* 42.

## CHAPTER III.

## JOINT AND SEVERAL CONTRACTS.

A RIGHT may belong to two or more individuals jointly; it cannot belong to each severally. An obligation, however, may be imposed upon two or more jointly, and upon each severally, at the same time. When two or more parties unite in making a promise they become joint promisors. When a promise is made to two or more jointly, they become joint promisees. When the promise is made by two or more jointly, and at the same time each makes the same promise severally, they become joint and several promisors. Promisees cannot be both joint and several.<sup>1</sup>

A contract is an entire thing, and therefore all who are parties to it must join as plaintiffs and be joined as defendants. A difference exists, however, in the manner of taking advantage of such non-joinder. If the declaration shows a non-joinder of the proper parties, advantage of such non-joinder may be taken by demurrer, or by motion in arrest of judgment; for the declaration shows that it is fatally defective.<sup>2</sup> If the declaration sets forth a promise by the defendant B. to the plaintiff A., and the evidence shows a promise by B. to A. and C. jointly, there is a fatal variance, for A. has no separate right in the contract and cannot sue

<sup>1</sup> *Slingsby's Case*, 5 Co. 19 a.

<sup>2</sup> *Bragg v. Wetzell*, 5 Blackf. 95; H. & W. 486; *Gilman v. Rives*, 10 Pet. 298; *Sweigart v. Berk*, 8 S. & R. 308; H. & W. 490; *Farni v. Tesson*, 1 Black, 309.

alone.<sup>1</sup> If the declaration sets out a promise by the defendant B. to the plaintiff A., and the contract sued on contains a joint promise by B. and C., B. cannot say that he has not promised, and must therefore plead in abatement the non-joinder of C. as defendant.<sup>2</sup>

The common law rule is that on the death of one joint promisor the surviving promisors alone remain liable;<sup>3</sup> and that on the death of one joint promisee the right of action accrues to the survivors.<sup>4</sup>

Any cause operating to discharge the right of action of one promisee will destroy the right of action of all.<sup>5</sup> In like manner, any cause operating to destroy the right of action against one of several joint promisors will discharge all of them;<sup>6</sup> except where one receives a purely personal discharge, as in bankruptcy. Where the contract is joint and several a judgment against the promisors jointly is a bar to an action against any of them severally;<sup>7</sup> and a judgment against one of them severally is a bar to an action against them jointly.<sup>8</sup> But where one of two joint promisors gives a check for the debt, a judgment recovered on this check does not

<sup>1</sup> *Jell v. Douglas*, 4 B. & Ald. 374; W. 273.

<sup>2</sup> *Whelpdale's Case*, 5 Co. 241; W. 270; *Richards v. Heather*, 1 B. & Ald. 29; W. 270.

<sup>3</sup> *Richards v. Heather*, *supra*.

<sup>4</sup> *Jell v. Douglas*, *supra*.

<sup>5</sup> *Myrick v. Dame*, 9 Cush. 248; *Austin v. Hall*, 13 Johns. 286; *Decker v. Livingston*, 15 Johns. 479; *Dyer v. Sutherland*, 75 Ill. 583; *Osborn v. Martha's Vineyard R. R. Co.*, 140 Mass. 549; 5 N. E. 486; W. 293.

<sup>6</sup> *Mason v. Eldred*, 6 Wall. 231; overruling *Sheehy v. Mandeville*, 6 Cranch, 254; *King v. Hoare*, 13 M. & W. 494; W. 273; *Kendall v. Hamilton*, 4 A. C. 504; W. 287; *Jansen v. Grimshaw*, 125 Ill. 468; 17 N. E. 850; *Moore v. Bevier*, 62 N. W. 281; — Minn. —.

<sup>7</sup> U. S. v. Price, 9 How. 83; *contra*, *Moore v. Rogers*, 19 Ill. 347; *People v. Harrison*, 82 Ill. 84.

<sup>8</sup> *Clifford, J.*, in *Sessions v. Johnson*, 95 U. S. 347, 348.

discharge the other, since the original claim is not merged in such a judgment.<sup>1</sup>

It is sometimes said that joint contracts will be treated as joint and several in equity. Such a statement, however, is inaccurate. A joint contract will be treated as joint and several in equity only when there is some equitable reason for so treating it. Thus, if money is loaned to two persons who give a joint obligation for its repayment, a court of equity will enforce the obligation against the representatives of the deceased obligor, "on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake, or want of skill, failed to accomplish their object."<sup>2</sup> Where no such equity exists, however, as in the case of a joint obligation by principal and surety, equity follows the law and recognizes only the legal obligation of the surety, which is discharged by his death.<sup>3</sup>

A few rules of construction for determining whether a contract is joint or several may here be given.

An obligation entered into by two or more parties is construed as a joint obligation unless it appears that the parties intended otherwise.<sup>4</sup>

A contract will be construed to be joint or several, according to the interests of the parties appearing on the face of the contract, if the words are capable of such construction; but the express language of the promise must govern.<sup>5</sup>

<sup>1</sup> *Drake v. Mitchell*, 3 East, 251; *Wegg Prosser v. Evans*, (1895) 1 Q. B. 108, overruling *Cambefort v. Chapman*, 19 Q. B. D. 229.

<sup>2</sup> *Davis, J.*, in *Pickersgill v. Lahens*, 15 Wall. 140, 144.

<sup>3</sup> *U. S. v. Price*, *supra*.

<sup>4</sup> *Elliott v. Bell*, 37 W. Va. 834; 17 S. E. 399; *White v. Tyndall*, 13 A. C. 263; *Eller v. Lacy*, 137 Ind. 436; 36 N. E. 1088.

<sup>5</sup> *Farni v. Tesson*, 1 Black, 309; *Keightley v. Watson*, 3 Ex. 716; *W. 281*; *Duncan v. Willis*, 51 Ohio St. 433; 38 N. E. 13.

The presumption that a contract is joint is not defeated by the fact that each promisor is to contribute separately to the entire result for which they bargain, and is entitled to a distinct interest under the contract for which he would have a separate remedy.<sup>1</sup>

A note signed by two or more, and running, "we promise to pay," is joint;<sup>2</sup> but if it runs, "I promise to pay," it is joint and several.<sup>3</sup>

Partnership contracts are joint. In equity they are sometimes said to be joint and several. This is incorrect; the only foundation for the statement is that partnership creditors are allowed to come into equity to obtain payment from the estate of a deceased partner, which is not liable at law.<sup>4</sup>

In equity, where two persons loan money to a third, there is a presumption of fact that they are tenants in common both of the debt and of any security given for it.<sup>5</sup>

<sup>1</sup> *Alpaugh v. Wood*, 53 N. J. L. 638; 23 A. 261.

<sup>2</sup> *Barnett v. Juday*, 38 Ind. 86.

<sup>3</sup> *Hemmenway v. Stone*, 7 Mass. 58; *Maiden v. Webster*, 30 Ind. 317; *Dill v. White*, 52 Wis. 456; 9 N. W. 404.

<sup>4</sup> Lord Cairns, C., in *Kendall v. Hamilton*, 4 A. C. 504, 516; W. 287.

<sup>5</sup> *Steeds v. Steeds*, 22 Q. B. D. 537; W. 352.

## CHAPTER IV.

## CONDITIONS.

## § 1. Nature of Conditions.

A condition is a fact or event which must precede some change in the legal relations of two parties. To constitute a condition, however, the fact in question must be uncertain. Thus in the case of a promise to pay \$100 on the 1st of January next, the arrival of the 1st of January is not a condition, for the reason that the day is sure to arrive. Nor is a promise to pay within a certain time after a man's death conditional, because the death is certain to occur.<sup>1</sup> It was held in one English case that a promise to pay at a certain time after a government ship was paid off was not a conditional promise, because the government is sure to pay;<sup>2</sup> but this decision seems questionable. The uncertainty in regard to a fact which makes that fact a condition need not be objective uncertainty; it is sufficient if that uncertainty exists in the mind of the party who seeks to treat that fact as a condition. Thus where a charter-party was made of a ship "now in the port of Amsterdam," although the ship was not in the port of Amsterdam at the time, the uncertainty of the charterer in regard to the location of the ship rendered that loca-

<sup>1</sup> *Roffey v. Greenwell*, 10 A. & E. 222; *Conn v. Thornton*, 46 Ala. 587.

<sup>2</sup> *Andrews v. Franklin*, 1 Strange, 24.

tion a condition.<sup>1</sup> Similar principles as to what constitutes legal uncertainty we have already seen applied with reference to the subject of consideration.

## § 2. Classification of Conditions.

Conditions may be divided in three ways, by three different modes of classification as far as contracts are concerned. They may be divided, first, with reference to their giving rise to some right, or putting an end to some right already existing. A fact or event which gives rise to a right is called a condition precedent. A fact or event which gives some one the right to put an end to some existing right of another is called a condition subsequent.

It is important to distinguish between a condition subsequent and a limitation. A limitation defines the extent or duration of a right, while a condition subsequent simply gives some one the right to put an end to that right. Thus if A. promises to pay B. an annuity so long as B. shall refrain from the use of tobacco, the extent of A.'s obligation is limited with reference to B.'s abstinence from tobacco, and the use of tobacco by B. in itself puts an end to A.'s obligation. But if A. gives B. an estate on condition that B. shall not use tobacco, the use of tobacco by B. gives A. a right to put an end to the estate, but does not of itself bring the estate to an end.

Conditions, again, may be divided according as they affect the formation of contract or the obligation of contract.

Finally, conditions may be divided according as they are facts which the parties have fixed upon as condi-

<sup>1</sup> Behn v. Burness, 1 B. & S. 877; 3 B. & S. 751; L. 556; Davison v. Von Lingen, 113 U. S. 40; 5 S. Ct. 346; H. & W. 265.

tions, or facts which the law treats as conditions without regard to the intention of the parties. The former may be called internal, the latter external conditions.

Internal and external conditions alike may be precedent or subsequent, and may affect the formation of contract or its obligation. Under the head of Formation of Contract we have already seen what external conditions precedent the law regards as essential to the formation of contract. External conditions subsequent affecting the contract itself will be treated under the head of Rescission of Contract. External conditions subsequent affecting the obligation of contract concern the Discharge of Contract; external conditions precedent to the obligation of a contract seem not to exist. Internal conditions alone are usually treated under the head of Conditions; and when the word condition is used it is ordinarily to be understood as meaning an internal condition.

Conditions in this narrow sense are of two kinds, those which affect the formation of contract, and those affecting its obligation. If A. covenants to pay B. \$100 in one year, provided B. goes to Rome, B.'s going to Rome is a condition precedent to A.'s obligation. If A. covenants to pay B. \$100 per annum for ten years, provided B. does not use tobacco during that time, B.'s use of tobacco is a condition subsequent, entitling A. to be discharged from his obligation to pay the annuity. If A. insures B.'s life on condition that the facts stated in B.'s application for insurance are true, the truth of B.'s statements is a condition precedent to the formation of the contract of insurance. If A. sells a cow to B. as a Jersey cow for \$100, and agrees that B. may return the cow if she is not a Jersey, the fact that the cow is not a Jersey is a condition subsequent, entitling B. to rescind the contract. No fact can be a condition affecting the



formation of a contract unless such fact exist at the time the contract is entered into. It is said by Professor Langdell<sup>1</sup> that "a covenant or promise cannot be conditional unless it first exist; it is only the performance of it that the condition renders uncertain. An event, therefore, which must happen before a covenant or promise is made, does not make the covenant or promise conditional. If the event happens, the covenant or promise is absolute; if it does not happen, no covenant or promise is made." This statement must be taken with some qualification and explanation.

When a unilateral contract is conditional upon the existence of a certain fact, if the fact does not exist, the contract is void; or to speak more accurately, the apparent contract is not a contract at all.

In the case of a bilateral contract, if all the promises of both parties are conditional upon the existence of a certain fact, and that fact does not exist, the agreement is void. For example, A. agrees to sell and B. to buy a certain cargo of corn which is supposed to be on board a certain ship destined for England. As a matter of fact, the cargo has already been unloaded and sold. If the existence of the cargo is a condition upon which the parties make their agreement, the apparent contract is void.<sup>2</sup> If, however, one party's promise is absolute, and the promise of the other party is conditional upon the existence of a certain fact, the non-existence of that fact renders the contract not void, but voidable at the option of the party whose promise is conditional. Whenever one of the parties to a contract warrants the existence of a certain fact, the non-existence of that fact may be a condition subsequent, entitling the other party to avoid the contract, but cannot affect the obli-

<sup>1</sup> Summary of Contracts, §§ 27, 28.

<sup>2</sup> *Conturrier v. Hastie*, 5 H. L. C. 673.

gation of the party giving the warranty. If, however, as in *Couturier v. Hastie*,<sup>1</sup> the existence of a fact is not warranted, it may be a condition precedent to the formation of the contract.

In the leading case of *Behn v. Burness*<sup>2</sup> it was agreed by a charter-party between the plaintiff and the defendant that the plaintiff's ship, "now in the port of Amsterdam," should proceed to another port for a cargo. The ship was not in the port of Amsterdam at the time the charter-party was executed. The court therefore gave judgment for the defendant. What the effect of the charter-party was has been much discussed. One view is that the statement as to the position of the ship being untrue, the defendant had made no promise.<sup>3</sup> Another view is that the charter-party was void, but that the plaintiff would have been estopped from showing that his own statement that the ship was in the port of Amsterdam was untrue.<sup>4</sup> It seems clear, however, from the opinion of the court, that the charter-party was regarded as voidable by the charterer, and not as void. In a similar case in the United States Supreme Court there were cross-actions on a similar charter-party. The ship-owner sued to recover for an alleged breach by the charterer, and was defeated because his stipulation in regard to the ship had not been fulfilled, and was regarded as a condition precedent to the charterer's obligation under the contract. The charterer sued for breach of the stipulation in regard to the ship, and recovered judgment on the ground that such stipulation was a warranty by the owner.<sup>5</sup> In both these

<sup>1</sup> *Supra*.

<sup>2</sup> 3 B. & S. 751; L. 556.

<sup>3</sup> Langdell, Summary, § 28.

<sup>4</sup> Pollock, Contracts, p. 489, note (b).

<sup>5</sup> *Davison v. Von Lingen*, 113 U. S. 40; 5 S. Ct. 346; H. & W. 265.

cases the stipulation in regard to the ship was looked upon as a condition precedent affecting the charterer's *obligation* under the contract, and as a condition subsequent, entitling the charterer to rescind the contract itself. Thus the same fact may be a condition precedent as regards a party's *obligation* under a contract, and a condition subsequent as regards the *validity* of the contract itself.

Again, a certain fact may be a condition precedent affecting the *obligation* of a party under one contract, and a condition subsequent giving him the right to *avoid* another contract. Whenever a sale occurs and the purchase-money is unpaid there are always in reality two contracts, one bilateral, the other unilateral. The bilateral contract is this: A. promises to sell B. certain goods in consideration of A.'s promise to take those goods and pay for them. This bilateral contract is a *contract to sell*, on the one hand, and to buy, on the other, and it has in view the making of a subsequent *contract of sale*. The contract of sale, on the other hand, is unilateral. In consideration of the transfer by A. to B. of the title to the goods, B. agrees to pay A. the purchase price, which thereupon becomes a debt due from B. to A. The bilateral and the unilateral contract may be actually simultaneous, but theoretically the bilateral contract may always be regarded as preceding the unilateral. The distinction between these two contracts is of great importance, though it is sometimes lost sight of. Thus if B. refuses to receive the goods tendered by A. in accordance with the bilateral contract, B. is liable in *assumpsit* for damages, the measure of damages being the injury sustained by A. through B.'s refusal to accept the goods.<sup>1</sup> If, however, the goods are accepted by B., B. thereupon becomes liable to

<sup>1</sup> Benjamin on Sales, § 762; *Laird v. Pim*, 7 M. & W. 474; L. 914.

A. in debt or *indebitatus assumpsit* for the price agreed upon.<sup>1</sup> This distinction has been ignored by some courts, which allow A. to recover the price, although the title to the goods has not passed to B.<sup>2</sup> Now a given fact may be a condition precedent to the obligation of the vendee to accept the goods under the bilateral contract, and a condition subsequent affecting the validity of the unilateral contract to pay the price. Thus it is a condition precedent to the obligation of the buyer to accept the goods that the vendor should tender goods of the description called for by the contract.<sup>3</sup> If the title to the goods tendered once passes to the vendee, the passage of title gives rise to a unilateral contract on the part of the vendee to pay the price. If the vendee subsequently discovers the goods to be different from those called for by the bilateral contract, and the defect amounts to a breach of the condition upon which he accepted the goods, he may avoid the contract by restoring or offering to restore the goods.<sup>4</sup> Thus the failure of the goods tendered to correspond with the goods described in the executory contract will prevent the seller from insisting that the buyer is bound to take them, because it is a condition precedent to the buyer's obligation under the bilateral contract that the goods shall correspond with the description; while after the goods have been accepted, such defect, if sufficiently important, will amount to a condition subsequent affecting the validity of the unilateral contract to pay the price.

Similar principles apply to the case of insurance policies. An insurance policy is a unilateral contract,

<sup>1</sup> Benjamin on Sales, § 765.

<sup>2</sup> Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279; 62 N. W. 480.

<sup>3</sup> Benjamin on Sales, § 600.

<sup>4</sup> *Ibid.* § 600; Alden v. Hart, 161 Mass. 576; 37 N. E. 742.

which is preceded theoretically by a bilateral contract. The bilateral contract consists of mutual promises, the insurer's promise to issue the policy, and the promise of the insured to accept it. The issue and acceptance of the policy constitute a performance of the bilateral contract, and give rise to one or two unilateral contracts; one, if the premium is paid, two, if it is not, as the premium becomes a debt on the acceptance of the policy.<sup>1</sup> So in the case of a lease, an agreement to lease is a bilateral contract, while the lease itself is only partly bilateral. An event, then, which is to happen before the beginning of the tenancy, such as the repair of the premises by the lessor, is a condition precedent affecting the lessee's obligation to become a tenant;<sup>2</sup> but if the lessee does become a tenant, the lessor's failure to repair does not affect the lessee's obligation to pay the rent.<sup>3</sup> So in a charter-party, the seaworthiness of the vessel at the time of sailing may be a condition precedent to the obligation of the charterer to take the vessel, but on principle it cannot be a condition precedent to his obligation to pay the freight after he has once accepted the vessel.<sup>4</sup> If, however, the condition of the vessel is such that the vessel is lost and the freighter is thereby deprived of any benefit under the contract, the freighter has the right to treat the loss of the vessel as a condition subsequent, entitling him to rescind the contract.

<sup>1</sup> Langdell, Summary, § 119.

<sup>2</sup> *Tidey v. Mollett*, 33 L. J. C. P. 235; L. 567.

<sup>3</sup> Langdell, Summary, § 119.

<sup>4</sup> *Ibid.* The opinion to the contrary in *Thompson v. Gillespy*, 5 E. & B. 209, L. 537, is conclusively shown by Professor Langdell to be unsound.

**§ 3. Conditions distinguished from Representations and Warranties.**

It is important to distinguish between representations, warranties, and conditions. A representation is a statement made by one party to the other before or at the time of making the contract in regard to some matter or circumstance relating to the subject matter of the contract. If the party making the representation assumes legal responsibility for its truth, the representation thereupon becomes a warranty. If the representation amounts to a description of the subject matter of the contract, it becomes a condition. If the party entitled to insist upon this condition has received substantially what he bargained for, though the condition has not been fulfilled, the condition then becomes what has been termed a warranty *ex post facto*. This term is inappropriate, because if a representation amounts to a warranty it is a warranty at the time the contract is made. The fact that the representation is a condition as well, and that it subsequently ceases to be a condition, does not in any way affect its character as a warranty. The terms warranty and condition are often confused and used interchangeably. The distinction, however, is clear. In speaking of a representation by A. to B. as a warranty, we are looking at that representation with reference to A.'s obligation. When we speak of the same representation as a condition, we are dealing with the effect of that representation on B.'s obligation.

**§ 4. Suspension and Discharge of Obligation by Conditions.**

A condition subsequent may operate as a partial or as an entire discharge of the contract. If a state of facts occurs which releases the promisor from his obligation

## 150 ELEMENTS OF THE LAW OF CONTRACTS.

to perform his contract so long as that state of facts continues to exist, and the state of facts in question lasts so long, or is of such a character that the failure of performance caused thereby goes to the root of the contract, the contract is discharged entirely;<sup>1</sup> otherwise the contract is only suspended during the continuance of such state of facts.<sup>2</sup>

### § 5. Conditions Subsequent in Form, Precedent in Fact.

There are contracts in which conditions are expressed as conditions subsequent, when in reality the conditions are conditions precedent. Thus in the case of an ordinary bond the obligor acknowledges that he is bound to the obligee in a certain sum, provided that the obligation shall be void if a certain event shall happen. The obligation to pay the penalty of the bond does not arise until the time specified for the event to occur has elapsed, and the condition has been broken. What is apparently a breach of a condition subsequent, therefore, is in reality the fulfilment of a condition precedent.<sup>3</sup> Yet by reason of the form of the bond the defendant is compelled to show performance of the condition.<sup>4</sup>

### § 6. Conditions affecting Right of Action.

A condition may be annexed as well to the right of action for breach of contract as to the contract itself. Thus it is a common provision that disputes in regard to breaches of contract shall be referred to arbitration, and such reference may be made a condition precedent

<sup>1</sup> Geipel v. Smith, L. R. 7 Q. B. 404; Jackson v. Union Ins. Co., L. R. 10 C. P. 125; New York Life Ins. Co. v. Statham, 93 U. S. 24.

<sup>2</sup> Hadley v. Clarke, 8 T. R. 259.

<sup>3</sup> Langdell, Summary, § 44; Cage v. Acton, 1 Ld. Raym. 515; L. 772.

<sup>4</sup> Gray v. Gardner, 17 Mass. 188; L. 785.

to a right of action upon the contract.<sup>1</sup> Or it may be agreed that an action for breach of contract shall be barred if not brought within one year, and the failure to bring an action within that period will operate as a condition subsequent discharging the right of action.<sup>2</sup>

**§ 7. Concurrent Conditions.**

There is a class of conditions which are called concurrent. "A concurrent condition must consist of some act to be done by the covenantor or promisee, which can be done at the same moment that the covenant or promise is performed." It seems, however, that such conditions may properly be reduced to conditions precedent, by treating an *offer* to perform the act called a condition concurrent as a condition precedent. Thus in the case of mutual promises to marry, performance on each side is said to be a condition concurrent of the promise on the other side. The contract may be looked upon, however, as containing a condition precedent to the obligation of either party that the other party shall offer to perform the contract.

**§ 8. Express and Implied Conditions.**

Conditions are divided by Professor Langdell\* into express conditions, which are expressed in terms; conditions implied in fact, which are implied from something contained in the covenant or promise; and conditions implied by law, which are not based upon the interpre-

<sup>1</sup> *Scott v. Avery*, 5 H. L. C. 811; W. 195; *Viney v. Bignold*, 20 Q. B. D. 172; W. 201; *Caledonian Ins. Co. v. Gilmour*, (1893) A. C. 85; *Hamilton v. Liverpool Ins. Co.*, 136 U. S. 242; 10 S. Ct. 945; H. & W. 351; *Hood v. Hartshorn*, 100 Mass. 117.

<sup>2</sup> *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386.

\* Summary, § 32.



tation of the covenant or promise, but upon its construction. Whatever may have been the former importance of this distinction, it seems to be of little or no practical consequence at the present day. It has been urged by Professor Keener<sup>1</sup> that conditions implied by law are not true conditions, because they are only found when the party to a contract has failed to protect himself by the insertion of express conditions. With regard to a certain class of conditions, which are really external to the contract, this criticism is sound; but with reference to internal conditions it is not well taken. Internal conditions are always gathered from the contract itself, and when they are implied by the law they are always implied because the law supposes that the intention of the parties is to treat a given fact as a condition, even though they have not manifested that intention in express words. The fact that the court always tries to discover the intention of the parties by looking at the entire contract, and that such intention is the sole rule for determining whether a given fact is or is not a condition, shows clearly that an internal condition implied by law is just as much a part of the real contract of the parties as if the condition had been set forth in express words. When the court goes beyond the contract itself, however, as it sometimes does, and attempts to introduce conditions which cannot possibly be based upon any construction of the contract, then it is not enforcing the contract obligation, but is modifying that obligation by taking other things than the contract into consideration.

#### **§ 9. Dependent and Independent Promises.**

When the obligation to perform one of two covenants or promises is conditional upon the performance of the

<sup>1</sup> *Quasi-Contracts*, p. 225.

other, the former is said to be dependent on the latter. When the obligation of each of two promises is conditional upon an offer to perform the other, the two covenants or promises are said to be mutually dependent. If the condition is express, the dependency is express; if the condition is implied, the dependency is implied. The doctrine of implied dependency was introduced by Lord Mansfield in 1773.<sup>1</sup> Before Lord Mansfield's time if there was no express dependency of one promise on another the breach of his promise by one party gave the other only a right to a cross-action, and was no defence to an action by the party who had thus broken the contract. At the present day the distinction between express and implied dependency, like that between express and implied conditions, seems immaterial.

Whether covenants or promises are dependent or independent is a question of the intention of the parties, to be determined from the whole contract.<sup>2</sup> Arbitrary rules, therefore, are useless; but the following general principles govern the courts in their construction of contracts.

If the time for the performance of an act is fixed solely by reference to some other event, and is to happen after such event, that event is a condition precedent to the obligation to perform such act;<sup>3</sup> but if the time for such performance is to be determined without

<sup>1</sup> *Kingston v. Preston*, cited in *Jones v. Barkley*, Doug. 684; L. 901; Langdell, Summary, § 143.

<sup>2</sup> *Loud v. Pomona Land Co.*, 153 U. S. 564; *Stavers v. Curling*, 3 Bing. N. C. 355; L. 676; *Seeger v. Duthie*, 29 L. J. C. P. 253; 30 L. J. C. P. 65; L. 691; *Philadelphia, W. & B. R. R. v. Howard*, 13 How. 307.

<sup>3</sup> *Loud v. Pomona Land Co.*, *supra*; *Holdipp v. Otway*, 2 Wms. Saunders, 106; L. 445; *Northrup v. Northrup*, 6 Cowen, 296; H. & W. 576; L. 721.

reference to such event, that event is not a condition precedent to such obligation.<sup>1</sup>

Hence if one of two promises is to be performed at a given time after the performance of another, the first promise is dependent on the second.<sup>2</sup> But if the time for the performance of one promise is not fixed with reference to the performance of the other, the promises are independent. Thus if a contract fixes a time for the payment of the purchase money for land, and no time for the conveyance of the land, the promise to pay the purchase money is independent of the promise to convey the land.<sup>3</sup> So where there is a promise on one side to finish the performance of work by a certain day, and on the other to pay for the work in monthly instalments, the two promises are independent.<sup>4</sup>

When the time for the performance of each act is fixed, as when A.'s promise is to be performed on November 1, and B.'s promise on December 1, it seems that B.'s promise is not dependent on A.'s performance, but that a failure by A. to perform his promise may amount to a condition subsequent entitling B. to a discharge from his liability. Professor Langdell maintains<sup>5</sup> that B.'s promise is dependent on A.'s promise; but the case of *Grant v. Johnson*,<sup>6</sup> relied on by him, seems unsound in its reasoning. In fact, the New York courts have developed a peculiar and erroneous doctrine with regard to instalment contracts. It is held in New York that where the purchase money for land is to be

<sup>1</sup> *Mattock v. Kinglake*, 10 A. & E. 50; L. 662; *Wilks v. Smith*, 10 M. & W. 355; L. 666; *Dicker v. Johnson*, 6 C. B. 103; L. 676.

<sup>2</sup> *Loud v. Pomona Land Co.*, *supra*; *Northrup v. Northrup*, *supra*.

<sup>3</sup> *Mattock v. Kinglake*, *supra*; *Wilks v. Smith*, *supra*; *Dicker v. Johnson*, *supra*; *McRaven v. Crisler*, 52 Miss. 542; H. & W. 577.

<sup>4</sup> *Philadelphia, W. & B. R. R. v. Howard*, 13 How. 307.

<sup>5</sup> Summary, § 122.

<sup>6</sup> 1 Seld. 247; L. 603.

paid in instalments, and some of such instalments are to be paid before the delivery of the deed, if the vendor sues before the time fixed for the delivery of the deed, and before the instalments are all due, he may recover for such instalments as are then due.<sup>1</sup> If the vendor sues after all the instalments are due, however, he must prove an offer to convey the land before bringing suit. When the last instalment falls due the payment of the whole of the purchase money and the conveyance of the land become mutual concurrent conditions.<sup>2</sup> The same rule applies when an action is brought for any instalment payable at or after the time fixed for the delivery of the deed.<sup>3</sup> These decisions rest on two erroneous ideas: first, that the tender of the deed is a condition precedent to the right of recovery of all instalments due after the date fixed for the delivery of the deed; second, that two promises not originally dependent may become so by reason of some subsequent event. It is clearly an unwarrantable construction to place on a contract to say that the promise to pay an instalment at a fixed date is dependent upon a promise to convey the land simply because the date set for the delivery of the deed occurs prior to the date fixed for the payment of such instalment. And it is entirely inconsistent with any theory of dependency whatsoever, to hold that two promises originally independent may become dependent by virtue of some event which happens after the time fixed for the performance of the promise which is treated as dependent. If A. promises to convey land to B. on February 1, and B. promises to pay A. \$200 for the

<sup>1</sup> *Paine v. Brown*, 37 N. Y. 228; *Harrington v. Higgins*, 17 Wend. 376.

<sup>2</sup> *Beecher v. Conradt*, 13 N. Y. 108; L. 767; *Hill v. Grigsby*, 35 Cal. 656; *H. & W.* 580; *Shelly v. Mikkelsen*, 63 N. W. 210; — S. D. —.

<sup>3</sup> *Grant v. Johnson*, *supra*; *Eddy v. Davis*, 116 N. Y. 247; 22 N. E. 362; W. 613.

land, \$100 January 1, and \$100 March 1, the promise to pay \$100 January 1 is necessarily independent, and when January 1 arrives the obligation to pay arises. To hold that this obligation to pay \$100, which is absolute January 1, becomes conditional February 1, on the delivery of the deed by A., is to take a wholly untenable position.

The true rule in regard to such instalment contracts is this: that the promises to pay those instalments which become due before the date set for the delivery of the deed are absolute and independent, and are in no way affected by a failure to deliver the deed at the time specified.<sup>1</sup> But where the deed is to be delivered *simultaneously* with the payment of the last instalment, then on payment of the previous instalments the tender of the deed and the tender of the last instalment become mutual concurrent conditions.<sup>2</sup>

If A.'s promise is to be performed at a fixed time, and B.'s promise requires continued performance before and after that time, A.'s promise is independent of B.'s, and performance by B. is not a condition precedent to A.'s obligation. Entire performance by B. cannot in the nature of the case be a condition precedent; and there is no reason to suppose that the parties intended A.'s promise to be conditional upon partial performance by B.<sup>3</sup> In such a case, however, B.'s failure to perform may be a condition subsequent, entitling A. to put

<sup>1</sup> Kane v. Hood, 13 Pick. 281; L. 760; Sheeren v. Moses, 84 Ill. 448; Duncan v. Charles, 5 Ill. 561.

<sup>2</sup> Kane v. Hood, *supra*; Sheeren v. Moses, *supra*; Duncan v. Charles, *supra*; Headley v. Shaw, 39 Ill. 354.

<sup>3</sup> Judson v. Bowden, 1 Ex. 162; L. 673; Campbell v. Jones, 6 T.R. 570; L. 839; Carpenter v. Crosswell, 4 Bing. 409; L. 870; Goldborough v. Orr, 8 Wheat. 217. Professor Langdell regards performance by B. up to the time fixed for performance by A. as a condition precedent to his obligation. Summary, § 129.

an end to the contract, if such failure amounts to a repudiation of the entire contract.<sup>1</sup>

If the obligation of A.'s promise is contingent upon some future event, performance by A. will not be an implied condition precedent to the obligation of B.'s promise. Thus, when B. promises A. to pay A. a sum of money in consideration of A.'s guaranteeing that C. will perform some act, the performance of such act by C. will not be a condition precedent to B.'s obligation to pay the money.<sup>2</sup>

Where a contract is made for the sale of goods, and the goods are to be delivered in instalments and paid for upon or after delivery, tender of each instalment in accordance with the terms of the contract is a condition precedent to the vendee's obligation to accept such instalment.<sup>3</sup> So also readiness and willingness to accept the goods on the part of the buyer is a condition precedent to the vendor's obligation to deliver.<sup>4</sup> The payment for an instalment by the vendee, however, is not a condition precedent to the vendor's obligation to deliver other instalments.<sup>5</sup>

A promise which can only be performed on the happening of a certain event is conditional upon the happening of that event.<sup>6</sup> Hence if any option is to be exercised

<sup>1</sup> See cases *supra*.

<sup>2</sup> *Christie v. Borelly*, 29 L. J. C. P. 153; L. 688.

<sup>3</sup> *Norrington v. Wright*, 115 U. S. 188; 6 S. Ct. 12; W. 593; H. & W. 584; *Hoare v. Rennie*, 5 H. & N. 19; L. 549; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; 7 S. Ct. 882; *contra*, *Gerli v. Poidebard Mfg. Co.*, 31 A. 401; — N. J. L. —.

<sup>4</sup> *Honck v. Muller*, 7 Q. B. D. 92; W. 578; *Creswell Ranch Co. v. Martindale*, 63 F. 84; 11 C. C. A. 36; 27 U. S. App. 277; *contra*, *Gerli v. Poidebard Mfg. Co.*, *supra*.

<sup>5</sup> *Mersey Co. v. Naylor*, 9 A. C. 434; W. 586; *Franklin v. Miller*, 4 A. & E. 599; L. 872; *Withers v. Reynolds*, 2 B. & Ad. 882; L. 740; *Freeth v. Burr*, L. R. 9 C. P. 208; L. 712.

<sup>6</sup> *Langdell*, Summary, § 41.

by one party to the contract, the exercise of such option is a condition precedent to the other's obligation.<sup>1</sup>

In order that two promises may be mutually dependent they must be capable of performance at the same time and place, and they must involve an exchange of rights between the parties.<sup>2</sup> Professor Langdell maintains that in order that two promises may be mutually dependent the performance of the one must be regarded as full payment for the performance of the other.<sup>3</sup> This theory of equivalency, however, although most ingeniously developed by Professor Langdell, does not seem to be based on satisfactory authority.<sup>4</sup>

It seems that the true test of mutual dependency is not whether or not the promises in question are legally equivalent to each other, but whether the parties intend that the two promises shall be simultaneously performed.<sup>5</sup> Whenever the contract contemplates an exchange of rights between the parties, and no time is fixed for such exchange, or the contract provides that the promises shall be performed at the same time and place, then the promises are mutually dependent. Thus in every contract for the sale of goods where no time is specified for performance of the contract, tender of the goods and tender of the price are mutual conditions concurrent.<sup>6</sup>

<sup>1</sup> Raynay v. Alexander, Yelv. 76; L. 443; Coombe v. Greene, 11 M. & W. 480; L. 497.

<sup>2</sup> Langdell, Summary, § 133.

<sup>3</sup> *Ibid.* § 136.

<sup>4</sup> "The circumstance that one of the conditions of a contract only affects part of the consideration is not *per se* sufficient to make it collateral to the main contract." Bank of China v. American Trading Co., (1894) A. C. 266, 271.

<sup>5</sup> Kane v. Hood, 13 Pick. 281; L. 760; Sheeren v. Moses, 84 Ill. 448; Headley v. Shaw, 39 Ill. 354; Duncan v. Charles, 5 Ill. 561; Glazebrook v. Woodrow, 8 T. R. 366; L. 732.

<sup>6</sup> Rawson v. Johnson, 1 East, 203; L. 805.

So where the contract calls for an exchange of rights and the time is fixed for the performance of one party's promise, but not for the performance of the others, the two promises are mutually dependent.<sup>1</sup>

The mere fact that mutual promises are to be performed within the same period does not make them mutually dependent unless the contract contemplates their performance at the same instant. Thus where a contract contained various stipulations on each side, and provided that each party should give security to the other for the performance of the contract within ten days, the promises to give security were held not to be mutually dependent; but giving security by each party was treated as a condition precedent to the other's obligation to perform.<sup>2</sup>

One promise can be dependent on another only where they both constitute parts of the same contract. There may be two or more contracts contained in the same instrument. If A. agrees to sell B. a horse for \$100, and B. agrees to sell A. a cow for \$100, these are two distinct contracts, though both agreements are contained in the same instrument.<sup>3</sup> But if A. agrees to sell B. a horse for \$100, and to take B.'s cow in payment for the horse, there is only one contract.<sup>4</sup>

Promises contained in two unilateral contracts cannot be dependent, even though they are given in consideration for each other.<sup>5</sup> This is especially true in the case of bills and notes, which by definition must be absolute obligations. A promissory note cannot be dependent on another promise, for that would make the note condi-

<sup>1</sup> *Morton v. Lamb*, 7 T. R. 125; L. 727; *Marsden v. Moore*, 4 H. & N. 500; L. 750; *Langdell, Summary*, § 133.

<sup>2</sup> *Roberts v. Brett*, 11 H. L. C. 337; L. 575.

<sup>3</sup> *Langdell, Summary*, § 115.

<sup>4</sup> *Atkinson v. Smith*, 14 M. & W. 695; L. 743.

<sup>5</sup> *Langdell, Summary*, § 117.



tional.<sup>1</sup> The American courts, however, have generally maintained the clearly erroneous doctrine that two unilateral contracts make one contract if each of the two contracts is the consideration for the other.<sup>2</sup>

#### § 10. Inconsistent Descriptions.

Contracts often occur in which two inconsistent descriptions are applied to the subject matter. If both these descriptions are regarded by the parties as essential, there is no contract, because there is no subject matter. Thus if A. agrees to sell to B. "this bar of gold," and the bar is not gold, there are two inconsistent descriptions of the subject matter. "This" describes the bar specifically, while "of gold" describes its nature. If the parties contract only on the supposition that the bar is gold, and there is no intention to deal with the bar in question if it is not gold, then there is no contract, because there is nothing in existence represented by the words "this bar of gold," and these words are therefore meaningless.<sup>3</sup> If, however, A.'s promise to sell is absolute, and not conditional on the bar's being gold, while B.'s promise to buy is conditional, A.'s promise may be interpreted thus: "I will sell you this bar, and I warrant that it is gold." In such a case the agreement is not meaningless. A. is bound by his promise to deliver the bar, and is responsible in damages for the fact that the bar is not gold.<sup>4</sup> B., on the other hand, is not bound to accept the bar, because his promise

<sup>1</sup> *Moggridge v. Jones*, 14 East, 486; L. 638; *Spiller v. Westlake*, 2 B. & Ad. 155; L. 654.

<sup>2</sup> *Duncan v. Charles*, 5 Ill. 561; *Bailey v. Cromwell*, 4 Ill. 72; *Hunt v. Livermore*, 5 Pick. 395; L. 757; *Hall v. Perkins*, 5 Ill. 548; *Ft. Payne Coal & Iron Co. v. Webster*, 163 Mass. 134; 39 N. E. 786; *Hill v. Grigsby*, 35 Cal. 656; H. & W. 580; *Shelly v. Mikkelsen*, 63 N. W. 210; — S. D. —.

<sup>3</sup> See *Couturier v. Hastie*, 5 H. L. C. 673; *Holmes, Common Law*, 311.

<sup>4</sup> *Davison v. Von Lingen*, 113 U. S. 40; 5 S. Ct. 346; H. & W. 265.

is conditional on the bar's being gold.<sup>1</sup> The bar not being gold, A. cannot compel B. to accept it, because the condition precedent of B.'s promise has not been performed. If, however, B. does accept the bar, the bilateral contract becomes a unilateral contract, and B. is bound to pay for the bar. This unilateral obligation of B., however, is subject to a condition subsequent, by virtue of which B. may avoid his obligation to pay for the bar by offering to return it;<sup>2</sup> and even the return is unnecessary if the bar has no value.<sup>3</sup>

The rules just stated apply where the two inconsistent descriptions of the subject matter of the contract are both essential. If two inconsistent descriptions are applied to the subject matter of a contract, and one is essential while the other is not, the non-essential description has no effect unless it be construed as a warranty on the part of one of the parties that such description is correct. If the contract is executory, as in the case of a bilateral contract to sell, A. must tender performance in accordance with his warranty as a condition precedent to B.'s obligation.<sup>4</sup> If the contract becomes unilateral, as in the case of a contract of sale where the property has passed to the buyer, the buyer's promise becomes absolute, and he cannot avoid his obligation to pay for the goods by reason of the breach of warranty. This principle is logically sound, and is followed in England and in many American courts.<sup>5</sup> In some States, however, to avoid circuitry of

Davison v. Von Linggen, *supra*; Behn v. Burness, 1 B. & S. 877; 3 B. & S. 751; L. 556.

<sup>2</sup> Benjamin on Sales, § 887.

<sup>3</sup> Poulton v. Lattimore, 9 B. & C. 259.

<sup>4</sup> Pope v. Allis, 115 U. S. 363; 6 S. Ct. 69; H. & W. 595; Davison v. Von Linggen, *supra*; Behn v. Burness, *supra*.

<sup>5</sup> Freyman v. Knecht, 78 Pa. St. 141; H. & W. 607; Benjamin on Sales, § 888; and pp. 903, 904 (Bennett's 6th ed.).

action a warranty may be treated as a condition subsequent; and the vendee may avoid his obligation to pay by offering to return the goods, as in the case of conditions proper.<sup>1</sup>

#### § 11. Performance of Conditions.

Contractual obligation is the result of a voluntary act which determines the extent of that obligation. If, then, the promisor attaches any conditions precedent to his promise, he cannot be bound unless those conditions are performed.<sup>2</sup> This rule is fundamental, and is subject only to the rule *de minimis non curat lex*. There may, however, be a quasi-contractual obligation imposed by the law on a party who has received a benefit at the hands of another to pay for the benefit received, although there is no contractual obligation to pay therefor. In some States a peculiar doctrine exists, under which, if A. has substantially performed his contract with B., and has attempted to perform in good faith, A. may recover the contract price of B., less the amount necessary to compensate B. for the damages caused by A.'s failure to perform the contract exactly.<sup>3</sup> Good faith is essential; and a wilful refusal to perform will prevent A.'s recovery.<sup>4</sup> This doctrine is clearly erroneous, and cannot be supported either on contractual or quasi-contractual theories. A. has no right to demand the contract price, because he has not performed the conditions of the contract; while if B.'s obligation is quasi-contractual,

<sup>1</sup> *Bryant v. Isburgh*, 13 Gray, 607; H. & W. 609; Benjamin on Sales, *ubi supra*.

<sup>2</sup> *Cutter v. Powell*, 6 T. R. 320; *Taylor v. Renn*, 79 Ill. 181.

<sup>3</sup> *Nolan v. Whitney*, 88 N. Y. 648; W. 575; H. & W. 542; *Hayward v. Leonard*, 7 Pick. 181; *Keeler v. Herr*, 157 Ill. 57; 41 N. E. 750.

<sup>4</sup> *Van Clief v. Van Vechten*, 130 N. Y. 571; 29 N. E. 1017; *Elliott v. Caldwell*, 43 Minn. 357; 45 N. W. 845.

it must be measured by the actual value of A.'s performance, not by the contract price less the damages caused by non-performance. The true rule is that the obligation in such cases, if any exists, is quasi-contractual and limited to the value of the benefit received.<sup>1</sup>

**§ 12. Waiver of Conditions.**

Conditions precedent and subsequent may both be waived by the act of the party for whom they are imposed; and such waiver may be either express or implied.

Waiver may take place by an acceptance of performance that does not fulfil the conditions of the contract. When a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract is not being fully performed, such acceptance may amount to a waiver of his right to require complete performance as a condition of his liability, and render him liable to pay for what he has received.<sup>2</sup>

In like manner, such acceptance of performance will operate as a waiver of the condition subsequent, in case the failure to perform in accordance with the contract would be a breach entitling the injured party to be discharged from the contract.<sup>3</sup>

A condition precedent is waived when the party for whose benefit the condition is imposed prevents its per-

<sup>1</sup> *Blood v. Wilson*, 141 Mass. 25; 6 N. E. 362; *Atkins v. Barnstable*, 97 Mass. 428; *Keener*, *Quasi-Contracts*, p. 313, note 2; *Taylor v. Renn*, 79 Ill. 181.

<sup>2</sup> *Sykes v. St. Cloud*, 62 N. W. 613; — *Minn.* —; *Wiley v. Athol*, 150 Mass. 426; 23 N. E. 311; *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84; 37 N. E. 676.

<sup>3</sup> *Cahen v. Platt*, 69 N. Y. 348; W. 608; *Harber Bros. Co. v. Moffat Cycle Co.*, *supra*; *Havelock v. Geddes*, 10 East, 555; L. 857.

formance.<sup>1</sup> This rule applies to two classes of cases: first, where the condition precedent cannot be performed without some positive act first being done by the party who sets up the condition; and second, where such party by an affirmative act prevents the performance of the condition.

Thus in England a vendor of land is bound to tender a deed to the purchaser, but the purchaser is bound to prepare the deed for execution; and therefore failure of the purchaser to prepare the deed will excuse the tender of the deed by the vendor.<sup>2</sup>

Positive acts which will excuse the performance of conditions may be of various kinds. Thus the defendant may direct the plaintiff not to perform the condition.<sup>3</sup> Or he may render its performance impossible or useless in various ways.<sup>4</sup> Thus if A. and B. are engaged to marry each other, the promises to marry are mutually dependent, and either party must ordinarily show a request to marry and a refusal by the other in order to sustain an action for breach of promise. But if one of the parties marries a third person and is thereby disabled from marrying the other party, the latter may sue without making any request for the performance of the contract.<sup>5</sup>

<sup>1</sup> *St. Louis & P. R. R. Co. v. Kerr*, 153 Ill. 182; 38 N. E. 638; *Mackay v. Dick*, 6 A. C. 251.

<sup>2</sup> *Poole v. Hill*, 6 M. & W. 835; L. 825.

<sup>3</sup> *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264; 7 S. Ct. 875.

<sup>4</sup> *Batterbury v. Vyse*, 2 H. & C. 42; L. 835; *Hinckley v. Pittsburgh Steel Co.*, *supra*; *Wolf v. Marsh*, 54 Cal. 228; H. & W. 560; *Delamater v. Miller*, 1 Cowen, 75; H. & W. 561; *Woodberry v. Warner*, 53 Ark. 488; 14 S. W. 67; H. & W. 574; *Hale v. Trout*, 35 Cal. 229; H. & W. 561; *St. Louis & P. R. R. Co. v. Kerr*, *supra*; *James v. Burchell*, 82 N. Y. 108; W. 609.

<sup>5</sup> *Short v. Stone*, 8 Q. B. 358; L. 921; *Caines v. Smith*, 15 M. & W. 189; L. 926.

A refusal by one party to perform his part of the contract will operate as a waiver of conditions precedent in favor of the other party.<sup>1</sup> The refusal, however, will operate as a waiver only in case it is an absolute renunciation of the contract, and is so treated by the other party.<sup>2</sup> Much confusion has arisen with regard to the effect of one party's refusal to perform upon the obligation of the other party. In a contract between A. and B., if B.'s promise is dependent on A.'s, performance by A. is a condition precedent to B.'s obligation. If, however, B.'s promise is not dependent on A.'s, B.'s obligation is not subject to such a condition precedent, but is subject to a condition subsequent, viz.: a *renunciation* of the contract by A., which entitles B. at his option to refuse to go on with the contract. In the first case, B.'s obligation does not arise until A. has performed; in the second case, B.'s obligation continues until he acts upon A.'s renunciation. The distinction is clear, but it has often been ignored. Thus in New Jersey it is held that where goods are to be delivered and paid for in instalments, default by either buyer or seller with reference to one instalment will not discharge the other party from his obligation to proceed with the contract, unless the conduct of the party in default be such as to evidence an intention to abandon the contract, or a design to be no longer bound by its

<sup>1</sup> *Hinckley v. Pittsburgh Steel Co.*, *supra*; *Greenup v. Stoker*, 3 Gilm. 202; *Jones v. Barkley*, Doug. 684; L. 901; *Laird v. Pim*, 7 M. & W. 474; L. 914; *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127; L. 937; *Windmuller v. Pope*, 107 N. Y. 674; 14 N. E. 436; H. & W. 555; *Frost v. Knight*, L. R. 7 Ex. 111; W. 386; *Daniels v. Newton*, 114 Mass. 530; W. 406; *Burtis v. Thompson*, 42 N. Y. 246; W. 419; *Stokes v. Mackay*, 41 N. E. 496; — N. Y. —.

<sup>2</sup> *Ripley v. M'Clure*, 4 Ex. 345; L. 927; *Johnstone v. Milling*, 16 Q. B. D. 460; W. 391.

terms.<sup>1</sup> This is clearly erroneous, and the error arises from ignoring the distinction just mentioned. The tender of each instalment of goods in accordance with the terms of the contract is a condition precedent to the buyer's obligation to accept the goods; and the buyer is not bound to perform the contract unless such condition precedent is fulfilled.<sup>2</sup> On the other hand, payment for one instalment is not a condition precedent to the seller's obligation to deliver the next instalment; and failure to make such payment will discharge the seller from further obligation under the contract only when such failure amounts to a renunciation of the contract.<sup>3</sup> The distinction between the tender of each instalment of the goods as a condition precedent to the buyer's obligation, and the refusal to pay for the goods as a condition subsequent affecting the seller's obligation is overlooked by the New Jersey court.

Nothing can excuse the performance of a condition but the act of the party for whose benefit it is imposed. Thus if a certificate of a third party is made a condition precedent to the promisor's obligation, a mistake by such third party, or lack of substantial reason for refusing to give the certificate, will not excuse its production.<sup>4</sup> Such a condition, however, is construed as meaning that the third party shall act in good faith.<sup>5</sup> Some courts

<sup>1</sup> *Gerli v. Poidebard Mfg. Co.*, 31 A. 401; — N. J. L. —.

<sup>2</sup> *Norrington v. Wright*, 115 U. S. 188; 6 S. Ct. 12; W. 593; H. & W. 584.

<sup>3</sup> *Mersey Co. v. Naylor*, 9 A. C. 434; W. 586.

<sup>4</sup> *Bradner v. Roffsell*, 31 A. 387; — N. J. L. —; *Bowman v. Stewart*, 30 A. 988; 165 Pa. St. 394; *Worsley v. Wood*, 6 T. R. 710; L. 472; *Thurnell v. Balbirnie*, 2 M. & W. 786; L. 489; *Clarke v. Watson*, 18 C. B. N. S. 278; L. 572; *Chicago & S. F. R. R. Co. v. Price*, 138 U. S. 185; 11 S. Ct. 290; *Martinsburg & P. R. R. Co. v. March*, 114 U. S. 549; 5 S. Ct. 1035; *Sweeney v. U. S.*, 109 U. S. 618; 3 S. Ct. 344; *Kihlberg v. U. S.* 97 U. S. 398; *Gilmore v. Courtney*, 158 Ill. 432; 41 N. E. 1023.

<sup>5</sup> *Kihlberg v. U. S.*, *supra*; *Sweeney v. U. S.*, *supra*; *Martinsburg &*

construe such a condition as meaning that the third party shall act reasonably,<sup>1</sup> but this is clearly wrong. The object of the parties in inserting such conditions is to provide a mode of settling their disputes; and if the court is to inquire into the reasonableness of the conduct of the party who is to give the certificate, the whole question is thrown open once more to be determined only by the lawsuit which the parties sought to avoid.

**§ 13. Equitable View of Conditions.**

Courts of equity take a different view of conditions from courts of law. Thus in the case of a contract to convey land, tender of a conveyance to the land and to the estate therein described in the contract is a condition precedent to the obligation of the purchaser to pay the purchase money.<sup>2</sup> In equity, however, if the difference between the property contracted for and that tendered does not go to the essence of the contract, specific performance will be granted with compensation to the vendee for such difference. This equitable rule applies only where equity has jurisdiction of the subject matter of the contract. In New York, and perhaps in other States where the distinctions between common law and equity are abolished, there is a marked tendency to extend this equitable doctrine to cases where it could never have been applied by a court of equity for the simple reason that a court of equity would not have

*P. R. R. Co. v. March*, *supra*; *Chicago & S. F. R. R. Co. v. Price*, *supra*; *Chism v. Shipper*, 51 N. J. L. 1.

<sup>1</sup> *Vought v. Williams*, 120 N. Y. 253; 24 N. E. 195; *Nolan v. Whitney*, 88 N. Y. 648; W. 575; H. & W. 542; *Crouch v. Gutman*, 134 N. Y. 45; 31 N. E. 271.

<sup>2</sup> *St. Albans v. Shore*, 1 H. Bl. 270; L. 464; *Wells v. Calnan*, 107 Mass. 514; L. 615.



had jurisdiction of the subject matter. This tendency, however, has called forth a protest from one of the judges of the New York Court of Appeals.<sup>1</sup>

<sup>1</sup> "The tendency, called equitable, of courts to relieve persons from the performance of engagements deliberately entered into, and in legal effect, to make for litigants new contracts which they never entered into, and which it cannot be supposed they ever would have entered into, has been and is being carried to a length which cannot be justified in reason." Follett, C. J., in *Crouch v. Gutmann*, 134 N. Y. 45; 31 N. E. 271; H. & W. 543, note.

## CHAPTER V.

## THE CONSTRUCTION OF CONTRACTS.

THE extent of the obligation of a contract is determined by the construction placed by the law on the conduct of the parties which gives rise to the contract. From our definition of contractual obligation the act which creates that obligation must define the extent of the obligation. Given, then, the voluntary act from which a contract springs, we must always inquire into the meaning of that act. The general principle governing the courts in their construction and interpretation of such legal acts is that such acts are to be regarded as bearing that construction which a reasonable man would place upon them. This broad general principle has given rise to numerous special rules which must here be considered.

**§ 1. General Rules of Construction.**

The primary rule for the construction of language is that words are to be construed according to their natural meaning.<sup>1</sup>

The literal meaning of the words must yield to that meaning in which the parties must be regarded as having used those words. The ordinary meaning does not apply where the context shows that a different interpretation is proper.

Where the conventional meaning of the words is not the same as their legal sense, the construction to be

<sup>1</sup> *Moran v. Prather*, 23 Wall. 492.

placed upon the language depends on whether or not the parties had the law in contemplation in making the contract.<sup>1</sup>

In any case the circumstances surrounding the parties at the time of making the contract must be taken into consideration to determine the meaning of the words used.<sup>2</sup> It follows, therefore, that it may always be shown that the parties contracted with reference to a particular custom or usage.<sup>3</sup> Thus where A. sold B. four thousand shingles, evidence was received to show that the term "thousand" was ordinarily used in the lumber trade to mean two packs of shingles of certain dimensions, without regard to the number of pieces in the pack.<sup>4</sup>

The custom must not, however, be absolutely repugnant to or inconsistent with the contract,<sup>5</sup> or contrary to any rule of law.<sup>6</sup>

The existence of the custom or usage is admissible solely for the purpose of showing that such custom or usage formed part of the contract into which the parties entered, although not expressed in terms in such contract; it is not admissible for the purpose of varying

<sup>1</sup> Per Lord Watson, *M'Cowan v. Baine*, (1891) A. C. 408.

<sup>2</sup> *Reed v. Ins. Co.*, 95 U. S. 23; H. & W. 511. "You are always entitled in regarding the construction and meaning of a written document to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances with reference to what, and with what intent, it must have been written." *Kekewich, J.*, in *Oliver v. Hunting*, 44 C. D. 209.

<sup>3</sup> *Brown v. Byrne*, 3 E. & B. 703; *Hostetter v. Park*, 137 U. S. 30; 11 S. Ct. 1; *Robinson v. U. S.*, 13 Wall. 363; *Bliven v. New Eng. Screw Co.*, 23 How. 420.

<sup>4</sup> *Sontier v. Kellerman*, 18 Mo. 509; H. & W. 508.

<sup>5</sup> *Moran v. Prather*, *supra*; *Barnard v. Kellogg*, 10 Wall. 383.

<sup>6</sup> *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374; *U. S. v. Buchanan*, 8 How. 83; *Thompson v. Riggs*, 5 Wall. 663.

the contract actually made.<sup>1</sup> It must therefore be shown that the party against whom the custom is alleged had knowledge thereof,<sup>2</sup> and that he contracted with reference thereto.<sup>3</sup> The existence of a custom, however, if sufficiently general, may raise a presumption that the parties contracted with reference to it.<sup>4</sup>

Several writings executed between the same parties, substantially at the same time, relating to the same subject matter, are to be construed together if they are parts of the same transaction.<sup>5</sup> So where two parties simultaneously execute bonds to each other the bonds are to be construed together.<sup>6</sup> And in a contract made by correspondence the whole correspondence must be construed.<sup>7</sup> In many cases the courts in applying these rules have ignored the real nature of the rules. A rule of construction can only be applied when there is something to construe. To determine the meaning of language used in one instrument by reference to another instrument executed at the same time and with reference to the same subject matter is perfectly proper. When, however, the court goes beyond this, and attempts to make one bilateral contract out of two unilateral contracts, on the alleged ground that the two instruments are to be "construed" together, the bounds of construction are clearly ignored. Yet it is very common for courts to say that two unilateral contracts executed at

<sup>1</sup> *Barnard v. Kellogg*, *supra*; *Oelricks v. Ford*, 23 How. 49.

<sup>2</sup> *Irwin v. Williar*, 110 U. S. 499; 4 S. Ct. 160.

<sup>3</sup> *Bliven v. New Eng. Screw Co.*, *supra*.

<sup>4</sup> *Soutier v. Kellerman*, *supra*; *Hostetter v. Park*, *supra*; *Robinson v. U. S.*, *supra*.

<sup>5</sup> *Bailey v. R. B. Co.*, 17 Wall. 96; *Joy v. St. Louis*, 138 U. S. 1; 11 S. Ct. 243.

<sup>6</sup> *Holt v. Rogers*, 8 Pet. 420.

<sup>7</sup> *U. S. v. Bostwick*, 94 U. S. 53.

the same time are to be "construed" as one contract.<sup>1</sup> It may or may not be legitimate, for example, to say that an absolute promise contained in a unilateral contract, such as a promissory note, shall be treated by the court as conditional upon the performance of some other promise by the payee; but to say that the court in laying down such a rule is "construing" the contract, is to disregard the very meaning of the term "construction."

In case the construction of an instrument is doubtful, the language is to be construed most strongly against the party using it.<sup>2</sup> If the language used is to be equally imputed to both parties, in case of doubt the construction is in favor of the promisor.<sup>3</sup>

Where particular words are in conflict with the general intention of the parties as shown by the language of the entire contract, the general intention to be gathered from the whole contract will control the construction of the particular words.<sup>4</sup> Thus general words in an instrument may be limited by other parts of the instrument which show that the general words have really a particular application.<sup>5</sup>

Where the language of a contract is of doubtful effect, the construction placed thereon by the parties is entitled to great weight, if it is not controlling;<sup>6</sup> but such construction cannot control the clear meaning of the contract.<sup>7</sup> The construction placed upon such contract by

<sup>1</sup> As in *Hunt v. Livermore*, 5 Pick. 395; L. 757.

<sup>2</sup> *Garrison v. U. S.*, 7 Wall. 688; *Noonan v. Bradley*, 9 Wall. 394.

<sup>3</sup> *Butler v. Wigge*, 1 Wms. Saund. 66.

<sup>4</sup> *Ford v. Beech*, 11 Q. B. 866; W. 323; *Boardman v. Reed*, 6 Pet. 328.

<sup>5</sup> *Bock v. Perkins*, 139 U. S. 628; 11 S. Ct. 677.

<sup>6</sup> *Topliff v. Topliff*, 122 U. S. 121; 7 S. Ct. 1057; *District of Columbia v. Gallagher*, 124 U. S. 505; 8 S. Ct. 585; *Chicago v. Sheldon*, 9 Wall. 50; *Lowber v. Bangs*, 2 Wall. 728; *Cincinnati v. Cincinnati Gaslight Co.*, 41 N. E. 239; — *Ohio St.* —.

<sup>7</sup> *Railroad Co. v. Trimble*, 10 Wall. 367.

the successors of those who made it, or by public officers, is entitled to much less weight.<sup>1</sup> And the understanding of one party to the contract cannot affect its construction unless such understanding was induced by the conduct of the other party.<sup>2</sup>

That construction of a contract is to be preferred which will render the contract enforceable. *Verba sunt intelligenda ut res magis valeat quam pereat.* If, therefore, a contract provides for alternative methods of performance, one of which is legal and the other illegal, the courts will enforce performance in the legal manner and disregard the alternative method. Thus where a note was given payable in Confederate money or in Tennessee money, it was held that payment in Tennessee money might be enforced, although the promise to pay in Confederate money was unlawful.<sup>3</sup> So where the contract refers to a class of objects in general terms, and some of the objects in the class are lawful and others unlawful, the agreement will be construed as applying only to those objects in regard to which the parties might legally contract.<sup>4</sup> So when a contract is valid by the law of one place and invalid by that of another, and there is doubt where the contract is to be performed, the contract will be construed as calling for performance in the place where it is valid.<sup>5</sup> And a clause in a contract providing for a forfeiture will in case of doubt be construed as allowing the avoidance of the executory part of the contract only, rather than the destruction of rights already vested by the execution of the contract.<sup>6</sup>

<sup>1</sup> *Cincinnati v. Cincinnati Gaslight Co.*, *supra*.

<sup>2</sup> *Bank v. Kennedy*, 17 Wall. 19.

<sup>3</sup> *Hanauer v. Gray*, 25 Ark. 350.

<sup>4</sup> *Gaskell v. King*, 11 East, 165; *Harrington v. Klopogge*, 2 Brod. & B. 678.

<sup>5</sup> *Pritchard v. Norton*, 106 U. S. 124; 1 S. Ct. 102.

<sup>6</sup> *Philadelphia, W. & B. R. R. Co. v. Howard*, 13 How. 307.

Punctuation may be considered in determining the meaning of a contract;<sup>1</sup> but only as a last resort.<sup>2</sup>

If there is an inconsistency between written and printed words in an instrument, the written words are entitled to greater weight.<sup>3</sup>

In the case of alternative and optional contracts, the person who is to perform has the right of election<sup>4</sup> unless some act is necessary on the part of the promisee as a condition precedent to the obligation of the contract.<sup>5</sup> Thus an agreement to accept from two to six hundred tons of a commodity gives the seller the option, because he must tender the goods before the buyer is bound to accept.<sup>6</sup> If the promisee has the election, he must notify the promisor.<sup>7</sup>

Contracts of guaranty are to be construed liberally.<sup>8</sup> Contracts affecting public interests are to be construed in favor of the public.<sup>9</sup> Contracts in restraint of trade are to be construed like ordinary contracts.<sup>10</sup>

## § 2. Impossibility.

A promise to do a thing in its nature impossible cannot, as we have seen, give rise to a contract. A man, however, may promise to do a thing which is in its

<sup>1</sup> *Joy v. St. Louis*, 138 U. S. 1; 11 S. Ct. 243.

<sup>2</sup> *Ewing v. Burnet*, 11 Pet. 41.

<sup>3</sup> *Robertson v. French*, 4 East, 130; *American Express Co. v. Pinckney*, 29 Ill. 392; *O'Rourke v. Burke*, 44 Neb. 821; 63 N. W. 17.

<sup>4</sup> *Layton v. Pearce*, 1 Doug. 15.

<sup>5</sup> *Thorn v. City Rice Mills*, 40 C. D. 357; *Honck v. Muller*, 7 Q. B. D. 92; W. 578.

<sup>6</sup> *Wheeler v. New Brunswick, &c., R. R. Co.*, 115 U. S. 29; 5 S. Ct. 1061, 1160.

<sup>7</sup> *Vyse v. Wakefield*, 6 M. & W. 442; L. 969; *Honck v. Muller*, *supra*.

<sup>8</sup> *Davis v. Wells*, 104 U. S. 159.

<sup>9</sup> *Joy v. St. Louis*, 138 U. S. 1; 11 S. Ct. 243.

<sup>10</sup> *Mills v. Dunham*, (1891) 1 Ch. 576.

nature possible, but which is actually impossible at the time of the making of the contract, or which may subsequently become impossible. If the impossibility exists at the time the contract is made, the effect of such impossibility depends upon the character of the contract. If the impossibility is due to the fact that two inconsistent descriptions are applied to the subject matter, and both those descriptions are essential, then, as we have seen, the contract is void, in the absence of any warranty that the descriptions are both correct.<sup>1</sup> If one party, however, warrants the correctness of the descriptions, the contract is binding on him, but voidable by the other party.<sup>2</sup>

Strictly speaking, of course, the performance of a contract can never be legally impossible. If a thing cannot be done, there can clearly be no obligation to do it. There may, however, be an obligation to compensate the other party for the non-performance of a promise which cannot be performed.<sup>3</sup> The real question therefore is, is there any duty to pay damages for non-performance of a contract, where the performance proves impossible? This is purely a question of con-

<sup>1</sup> *Conturrier v. Hastie*, 5 H. L. C. 673.

<sup>2</sup> *Behn v. Burness*, 1 B. & S. 877; 3 B. & S. 751; L. 556; *Davison v. Von Lingen*, 113 U. S. 40; 5 S. Ct. 346; H. & W. 265; *ante*, p. 144.

<sup>3</sup> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking where the event which causes the impossibility might have been anticipated and guarded against in the contract; or where the impossibility arises from the act or default of the promisor." *Jackson, J.*, in *Chicago, M. & St. P. Ry. v. Hoyt*, 149 U. S. 1, 14, 15; 13 S. Ct. 779; W. 22, note. "I think it is not competent to a defendant to say that there is no binding contract merely because he has engaged to do something which is physically impossible." *Brett, J.*, in *Clifford v. Watts*, L. R. 5 C. P. 577; W. 19.



struction.<sup>1</sup> Impossibility has in itself no effect on the contract; but if the contract is construed as imposing an obligation to do X., then, clearly, failure to perform Y. cannot constitute a breach of contract. We have then to consider the cases in which the language of the contract is construed as not applying to some situation which renders its literal performance impossible.

(a) LEGAL IMPOSSIBILITY.—A condition is ordinarily implied in a contract that if the law subsequently renders the performance of the contract according to its terms unlawful or impossible, the promisor shall be discharged from his obligation. Thus where a paddock was taken by a railway company under an Act of Parliament authorizing the compulsory purchase of land for the railway, it was held that the erection of a building by the railway company did not constitute a breach of a covenant by a previous lessee of the land with his lessor that neither the lessee nor his assigns would permit the erection of a building on the paddock. The covenant was held not to apply to the case in question.<sup>2</sup> So where the lessee of a wooden building agreed to rebuild the same in a suitable time in case of destruc-

<sup>1</sup> "The words of a contract are to be construed to include all circumstances which the parties actually contemplated at the time the contract was made, or which if they had thought properly about the matter they ought to have contemplated. If something has happened which it is obvious that no person of intelligence could have contemplated, the contract is construed as not applying to the circumstances thus produced." Lord Esher, in *Harrison v. Muncaster*, (1891) 2 Q. B. 680, 686; W. 28, note. "Where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Jackson, J., in *Chicago, M. & St. P. Ry. v. Hoyt*, *supra*.

<sup>2</sup> *Baily v. De Crespigny*, L. R. 4 Q. B. 180; W. 15.

tion by fire, and the building was burned, it was held that the subsequent passage of a city ordinance forbidding the erection of a wooden building in that locality discharged the lessor from his obligation to rebuild.<sup>1</sup> So where A. was under a contract of employment by a corporation, and the corporation was enjoined from carrying on business at the instance of the State, the contract was held to be discharged.<sup>2</sup> Where work was begun on a building, under an agreement that no extras should be paid for unless agreed to in writing, and the city building inspector ordered changes in the work, the defendant was held bound to pay for extra work caused by such orders, although there was no agreement in writing in regard to them.<sup>3</sup> Where A. agreed that if he left B.'s service without giving two weeks' notice he should receive nothing for wages due, it was held that the arrest and imprisonment of A. dispensed with the requirement of notice.<sup>4</sup>

A declaration of war discharges all contracts which require trading with the enemy for their performance.<sup>5</sup>

The fact that a foreign law renders the performance of a contract impossible is held to be of no consequence,<sup>6</sup> except in the case of a charter-party of a foreign ship, where impossibility caused by the law of the State to which the ship belongs is an implied condition discharging the contract.<sup>7</sup>

(b) EXISTENCE OF SUBJECT MATTER. — As we have

<sup>1</sup> *Cordes v. Miller*, 39 Mich. 581; H. & W. 645.

<sup>2</sup> *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174; W. 49.

<sup>3</sup> *Cunningham v. Fourth Baptist Church*, 159 Pa. St. 620; 28 A. 490.

<sup>4</sup> *Hughes v. Wamsutta Mills*, 11 Allen, 201; H. & W. 647.

<sup>5</sup> *Esposito v. Bowden*, 7 E. & B. 763; *Hanger v. Abbott*, 6 Wall. 532, 536.

<sup>6</sup> *Barker v. Hodgson*, 3 M. & S. 267.

<sup>7</sup> *Leake, Contracts*, 615; *The Teutonia*, L. R. 4 P. C. 171.

seen, the existence of the subject matter of a contract is ordinarily construed as a condition precedent to the existence of the contract, unless it appears that the intention of the parties was to make a contract regardless of the existence of the subject matter. And where the subject matter is in existence at the time the contract is made, the continual existence of the subject matter may be an implied condition of the contract. Thus where there is an agreement for the use of a hall, the destruction of the hall by fire discharges the contract.<sup>1</sup> So where A. leased a mine to B., and B. agreed to work the mine and pay so much a ton for the clay removed, and to remove a certain quantity yearly, it was held that the exhaustion of the clay discharged B. from his contract.<sup>2</sup> But where the lessee of a coal mine covenanted absolutely to raise a given quantity of coal in each year, or to pay a minimum rent which should represent the minimum amount of coal agreed to be worked, the lessee was held bound to pay the minimum rent at all events.<sup>3</sup>

Where there is an agreement for the sale of specific property, the existence of the property at the time performance is due is an implied condition of the contract. Thus in a contract for the sale of specific goods, the destruction of the goods before delivery discharges the contract.<sup>4</sup> So where there is a contract for the sale of a crop to be grown on specified land, and the crop fails, the contract is discharged.<sup>5</sup> But this rule does not apply

<sup>1</sup> *Taylor v. Caldwell*, 3 B. & S. 826.

<sup>2</sup> *Clifford v. Watts*, L. R. 5 C. P. 577; W. 19; *Walker v. Tucker*, 70 Ill. 527.

<sup>3</sup> *Bute v. Thompson*, 13 M. & W. 487.

<sup>4</sup> *Dexter v. Norton*, 47 N. Y. 62; H. & W. 649; *McMillan v. Fox*, 90 Wis. 173; 62 N. W. 1052.

<sup>5</sup> *Howell v. Coupland*, 1 Q. B. D. 258; W. 25

where the contract is for a certain quantity of the article without specifying the land on which it is to be raised.<sup>1</sup> Nor does it apply where one who has contracted to sell goods is unable to manufacture them on account of an accident to his machinery.<sup>2</sup>

When one contracts to furnish labor and materials, and to construct a chattel or to build a house on the land of another, the destruction of the chattel or building before the time fixed for its completion will not excuse him.<sup>3</sup> Nor will a latent defect in the soil,<sup>4</sup> nor the necessity of draining the land,<sup>5</sup> be a sufficient excuse. So where one contracts to build a well according to certain specifications, and the specifications call for a curb which is inadequate for the purpose, the inadequacy of the curb does not affect the obligation to build the well.<sup>6</sup> In such cases the impossibility in question has no effect on the contract because the contract is construed as absolute. But where A. contracts to make repairs on B.'s house, or to furnish a part of the work and materials used in the erection of B.'s house, and the destruction of the house renders performance of the contract impossible, A. may recover *pro rata* for the work done under his contract.<sup>7</sup> The English courts in such

<sup>1</sup> *Anderson v. May*, 50 Minn. 280; 52 N. W. 530; W. 40; H. & W. 639.

<sup>2</sup> *Summers v. Hibbard*, 153 Ill. 102; 38 N. E. 899.

<sup>3</sup> *Adams v. Nichols*, 19 Pick. 275; *School District v. Dauchy*, 25 Conn. 530.

<sup>4</sup> *Dermott v. Jones*, 2 Wall. 1; H. & W. 641; *School Trustees v. Bennett*, 27 N. J. L. 513.

<sup>5</sup> *Stees v. Leonard*, 20 Minn. 494; W. 33.

<sup>6</sup> *Leavitt v. Dover*, 32 A. 156; — N. H. —.

<sup>7</sup> *Cleary v. Sohler*, 120 Mass. 210; *Butterfield v. Byron*, 153 Mass. 517; 27 N. E. 667; W. 41; *Hollis v. Chapman*, 36 Tex. 1; *Clark v. Franklin*, 7 Leigh, 1; *Schwartz v. Saunders*, 46 Ill. 18; *Rawson v. Clark*, 70 Ill. 656; *Clark v. Busse*, 82 Ill. 515.

cases allow no recovery.<sup>1</sup> If any recovery is to be allowed in such cases it must be on the ground of an implied agreement by the owner of the building that he will pay *pro rata* for the actual performance of the work in case the building is destroyed. In some of the decisions, however, the ground on which recovery is allowed seems to be regarded as quasi-contractual,<sup>2</sup> which seems clearly erroneous.<sup>3</sup>

(c) BAILMENT CONTRACTS. — The obligation arising from a bailment is not necessarily contractual, but springs from the undertaking of the bailee. Where, however, there is a contract of bailment, the obligation of the contract will not, it seems, be construed as differing from the obligation imposed by the undertaking,<sup>4</sup> unless it affirmatively appears that the contract is intended to increase or to diminish the obligation which would otherwise exist.<sup>5</sup> Thus the obligation of a common carrier to receive and carry goods is not contractual, but is imposed by law. That obligation is to receive goods offered to him and to carry them safely to their destination unless prevented by the act of God, or of a public enemy. This obligation may be modified by contract so as to increase or to diminish the carrier's liability; but it must appear that the contract was intended to alter the common law obligation.

In accordance with this principle it has been held that the charterer of a ship is not liable where the ship

<sup>1</sup> Appleby v. Myers, L. R. 2 C. P. 651; Anglo-Egyptian Nav. Co. v. Rennie, L. R. 10 C. P. 271; and see Brumby v. Smith, 3 Ala. 123.

<sup>2</sup> Cook v. McCabe, 53 Wis. 250; 10 N. W. 507.

<sup>3</sup> See Keener, Quasi-Contracts, 254.

<sup>4</sup> Field v. Brackett, 56 Me. 121; Seevers v. Gabel, 62 N. W. 669; — Ia. —; *contra*, Harvey v. Murray, 136 Mass. 377.

<sup>5</sup> As in Wilmington Transportation Co. v. O'Neil, 98 Cal. 1; 32 P. 705; H. & W. 654.

is destroyed by the act of God;<sup>1</sup> but that if a bond is given conditioned for the return of the vessel, the obligors are liable on the bond notwithstanding such destruction of the vessel.<sup>2</sup> This distinction between the contract of bailment, or charter-party, and the bond given for the performance of the contract, seems at least of doubtful validity. The United States Supreme Court has held that sureties on a collector's bond conditioned for the payment of the money received were not liable where the money was captured by a public enemy, on the ground that the collector was a bailee, and that the bond was really conditioned only for the performance of his duties as bailee, so that there had been no breach of condition.<sup>3</sup>

(d) PERSONAL CONTRACTS.—Contracts involving personal performance by either of the parties, or by a third person, which can only be executed by the particular individual, are subject to the implied condition that the person shall be able to perform the contract; and his death or disability discharges the contract.<sup>4</sup> The death of the employer terminates a contract of employment, as well as the death of the employee.<sup>5</sup> And the dissolution of a corporation terminates its contracts with its employees;<sup>6</sup> unless the dissolution of the corporation is voluntary.<sup>7</sup> And the death of one of two joint contractors puts an end to the contract where the contract calls for personal performance by both.<sup>8</sup>

<sup>1</sup> *Ames v. Belden*, 17 Barb. 513.

<sup>2</sup> *Steele v. Buck*, 61 Ill. 343.

<sup>3</sup> *U. S. v. Thomas*, 15 Wall. 337.

<sup>4</sup> *Spalding v. Rosa*, 71 N. Y. 40; *W. 47*; *H. & W. 655*; *Boast v. Firth*, L. R. 4 C. P. 1; *Robinson v. Davison*, L. R. 6 Ex. 269.

<sup>5</sup> *Lacy v. Getman*, 119 N. Y. 109; 23 N. E. 452; *W. 54*; *Yerrington v. Greene*, 7 R. I. 589; *Whincup v. Hughes*, L. R. 6 C. P. 78; *Farrow v. Wilson*, L. R. 4 C. P. 744.

<sup>6</sup> *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174; *W. 49*.

<sup>7</sup> *Kalkhoff v. Nelson*, 62 N. W. 332; — Minn. —.

<sup>8</sup> *Landa v. Shook*, 30 S. W. 536; — Tex. —.

The prevalence of cholera in a certain place has been held to justify a laborer in refusing to work in that place.<sup>1</sup> But the prevalence of small-pox in a school district was held not to discharge the school district from liability to a teacher hired for a given period where the district had closed the schools during that period on account of the small-pox in the vicinity.<sup>2</sup>

### § 3. Reasonableness.

Where a contract calls for the performance of a certain act and the contract is silent as to the time or manner of performance, the contract is construed as imposing an obligation to act reasonably. Thus, where no time is specified in a contract for its performance, the contract is construed as calling for performance within a reasonable time.<sup>3</sup> A reasonable time means a reasonable time under the particular circumstances of the case. Thus, where a bill of lading specified no time for the discharge of the cargo of a ship, it was held that the consignees were bound to discharge the cargo within a reasonable time, and that the consignees were not liable for a delay in unloading caused by a strike of dock laborers, over which the consignees had no control.<sup>4</sup> Whether a strike by the servants of the consignees would be a sufficient excuse for the delay is perhaps uncertain. On principle, it would seem that such a strike ought to be a sufficient excuse, if the consignees were unable to obtain a sufficient number of laborers on reasonable terms. It has been held in New York, how-

<sup>1</sup> *Lakeman v. Pollard*, 43 Me. 463; W. 58.

<sup>2</sup> *Dewey v. Alpena School District*, 43 Mich. 480; 5 N. W. 646; W. 60.

<sup>3</sup> *Minneapolis Gaslight Co. v. Kerr-Murray Mfg. Co.*, 122 U. S. 300; 7 S. Ct. 1187.

<sup>4</sup> *Hick v. Raymond* (1893), A. C. 22.

ever, that a common carrier is not excused for delay in the delivery of goods, although no time was set for their delivery, where the delay is caused by a strike of the laborers employed by such carrier.<sup>1</sup> Possibly a distinction may be drawn between the case of a common carrier and that of an ordinary contractor, on the ground that, as a matter of public policy, the risk of a strike should be borne by the carrier, and not by the shipper.<sup>2</sup> It is established that, if the delay is caused by the active interference of the strikers, it is excused;<sup>3</sup> and there seems to be no valid reason for distinguishing between an impossibility caused by the violence of the strikers, and an impossibility caused by their refusal to work on reasonable terms, unless the reason of public policy just mentioned be sufficient.<sup>4</sup>

When a contract provides for the payment of money as soon as certain property of the debtor is sold, the debtor is bound to pay within a reasonable time, unless it is clear that the obligation is purely contingent.<sup>5</sup>

The words "with all despatch as customary" in a charter-party mean that the charterer is not responsible for delay due to impediments arising from the custom of the port,<sup>6</sup> but is liable for delay caused by extraneous impediments such as a strike.<sup>7</sup>

Where the promisor's obligation is conditional upon his satisfaction with the performance of the promise,

<sup>1</sup> *Blackstock v. N. Y. & E. R. R. Co.*, 20 N. Y. 48.

<sup>2</sup> 1 *Northwestern Law Rev.* 131.

<sup>3</sup> *Geismer v. Lake Shore & M. S. R. Co.*, 102 N. Y. 563; 7 N. E. 828; *Haas v. Kansas City, & C. R. Co.*, 81 Ga. 792; 7 S. E. 629; *Pittsburg, Ft. W. & C. R. R. Co. v. Hazen*, 84 Ill. 36.

<sup>4</sup> 1 *Northwestern Law Rev.* 131.

<sup>5</sup> *Nunez v. Dautel*, 19 Wall. 560; *Noland v. Bull*, 24 Or. 479; 33 P. 983; *Fisher v. Chadwick*, 34 P. 899; — Wy. —.

<sup>6</sup> *Postlethwaite v. Freeland*, 5 A. C. 599.

<sup>7</sup> *Castlegate Stp. Co. v. Dempsey* (1892), 1 Q. B. 54; W. 31.



the condition will sometimes be construed as meaning that the promisor shall act reasonably. If the contract in question does not involve the personal equation of the promisor, the tendency of the courts is to construe the contract as meaning that the promisor shall act reasonably.<sup>1</sup> If the personal taste of the promisor is concerned, the contract will be construed literally, and the promisor's obligation will be construed as conditional on his actual satisfaction.<sup>2</sup> Thus in a contract for household furniture,<sup>3</sup> or for a suit of clothes,<sup>4</sup> or for a work of art,<sup>5</sup> or for a dwelling-house heater,<sup>6</sup> to be paid for if satisfactory to the promisor, actual satisfaction has been held necessary. The parties, however, may agree in any case that the promisor shall have an unqualified option.<sup>7</sup> The promisor must always act in good faith;<sup>8</sup> and in New York it is held, contrary to the general rule, that he must act reasonably.<sup>9</sup>

#### § 4. The Essence of the Contract.

Many contracts contain more than one promise, even though there is apparently only a single promise involved. Thus a promise to do something at a par-

<sup>1</sup> *Hawkins v. Graham*, 149 Mass. 284; 21 N. E. 312; W. 6; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; 4 N. E. 749; H. & W. 546.

<sup>2</sup> *Duplex Safety Boiler Co. v. Garden*, *supra*; *Hawkins v. Graham*, *supra*; *Walter A. Wood, & Co. v. Smith*, 50 Mich. 565; 15 N. W. 906.

<sup>3</sup> *McCarren v. McNulty*, 7 Gray, 139.

<sup>4</sup> *Brown v. Foster*, 113 Mass. 136.

<sup>5</sup> *Zaleski v. Clark*, 44 Conn. 218.

<sup>6</sup> *Adams Radiator Works v. Schrader*, 155 Pa. St. 394; 26 A. 745; H. & W. 549.

<sup>7</sup> *Walter A. Wood, & Co. v. Smith*, *supra*; *Hawkins v. Graham*, *supra*; *Singerly v. Thayer*, 108 Pa. St. 291; 2 A. 230; W. 11.

<sup>8</sup> *Singerly v. Thayer*, *supra*; *Adams Radiator Works v. Schrader*, *supra*.

<sup>9</sup> *Doll v. Noble*, 116 N. Y. 230; 22 N. E. 406; W. 9.

ticular time or place, or in a particular manner, may often be resolved into two component promises: a promise to do the thing, and a promise to do it at a certain time or place, or in a particular manner. So a contract may provide for the sale of a particular article, and two descriptions may be given to the article; in which case there may or may not be a promise that the article shall answer both descriptions. In every case the question arises, What is the essence of the contract, and what promises or descriptions are merely subsidiary to the main object of the contract? This is a question of construction in every case, and the courts are not always agreed, but there are certain general principles of construction which are usually adhered to.

When a contract provides that something shall be done at a particular time, and the time is not of the essence of the contract, equity will seek to give effect to the main object of the contract, notwithstanding a failure of performance as to time. Time will not be regarded as of the essence of the contract, unless it affirmatively appears that the parties so regarded it.<sup>1</sup> Time is of the essence of the contract wherever the parties so stipulate;<sup>2</sup> and the nature of the contract may make the time of performance essential. Thus, in life insurance policies the time fixed for the payment of premiums is of the essence of the contract.<sup>3</sup> So in the case of a contract for the sale of property subject to rapid fluctuations in value, such as mineral property.<sup>4</sup> In mercantile contracts the time of shipment or delivery

<sup>1</sup> *Secombe v. Steele*, 20 How. 94; *Brown v. Guarantee Trust Co.*, 128 U. S. 403; 9 S. Ct. 127.

<sup>2</sup> *Cheney v. Libby*, 134 U. S. 68; 10 S. Ct. 498.

<sup>3</sup> *New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Klein v. Ins. Co.*, 104 U. S. 88.

<sup>4</sup> *Waterman v. Banks*, 144 U. S. 394; 12 S. Ct. 646.

of goods is part of the essential description of the goods.<sup>1</sup> The avowed object of the purchaser may render time of the essence of the contract when it would not be otherwise.<sup>2</sup> In charter-parties, the specification of a fixed time for the ship to be in a certain place, or to sail for a certain port, or to be in a certain condition, will ordinarily make time of the essence of the contract.<sup>3</sup> If, however, the time is not definitely fixed, but is described in general terms, it is not ordinarily treated as essential.<sup>4</sup> Fixing a time for the payment of money does not ordinarily have the same effect as fixing a time for the delivery of goods. "December wheat" is an entirely distinct thing from "January wheat" in the eyes of merchants; but December dollars do not differ essentially from January dollars.<sup>5</sup>

The effect of inconsistent descriptions of the subject matter of a contract has already been explained in the chapter on Conditions. We have here to consider in what cases an inconsistency has been regarded as material. This is a question of construction, for the parties may make whatever they choose material; the province of the court is simply to determine the meaning of their contract. Many cases of mistake, where the mistake has been in attributing to the subject

<sup>1</sup> *Bowes v. Shand*, 2 A. C. 455; *Norrington v. Wright*, 115 U. S. 188; 6 S. Ct. 12; W. 593; H. & W. 584; *Hoare v. Rennie*, 5 H. & N. 19; L. 549; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; 7 S. Ct. 882; *Honck v. Muller*, 7 Q. B. D. 92; W. 578; *Cresswell Ranch Co. v. Martindale*, 27 U. S. App. 277; 63 F. 84; 11 C. C. A. 33; *contra*, *Gerli v. Poidebard Mfg. Co.*, 31 A. 401; — N. J. L. —

<sup>2</sup> *Tilley v. Thomas*, L. R. 3 Ch. 61.

<sup>3</sup> *Glaholm v. Hays*, 2 M. & G. 257; L. 492; *Behn v. Burness*, 1 D. & S. 877; 3 B. & S. 751; L. 556; *Ollive v. Booker*, 1 Ex. 416; L. 501.

<sup>4</sup> *Tarrabochia v. Hickie*, 1 H. & N. 183; L. 681; *Freeman v. Taylor*, 8 Bing. 124; L. 483; *contra*, *Lowber v. Bangs*, 2 Wall. 728.

<sup>5</sup> See *Mersey Co. v. Naylor*, 9 A. C. 434; W. 586.

matter of the contract some quality which it does not possess, involve simply the question whether the parties have regarded that quality as part of the essential description of the subject matter or not.

The existence of the subject matter of the contract is construed as a condition of the contract,<sup>1</sup> unless one party warrants the existence of the subject matter, when it becomes a condition only of the other party's obligation.<sup>2</sup> If a particular quality is attributed to the subject matter by the parties, and that particular quality goes to the essence of the contract, the result is the same. In the following instances the failure of the subject matter to possess some given attribute has been held to go to the essence of the contract.

A substantial variance between the quantity of land in a given tract, and the quantity specified in the contract has been held to go to the essence.<sup>3</sup> A substantial difference in the title to property has been held to go to the essence in many cases.<sup>4</sup> In other cases a substantial difference in title has been held immaterial where the difference between the supposed and the actual title arose from a mistake of law,<sup>5</sup>—a doctrine which seems erroneous. The quality of land was held an essential part of the description where the land was supposed to contain coal, but did not.<sup>6</sup> Whether in the sale of a

<sup>1</sup> *Conturier v. Hastie*, 5 H. L. C. 673; *Strickland v. Turner*, 7 Ex. 208; *Allen v. Hammond*, 11 Pet. 63.

<sup>2</sup> *Davison v. Von Lingen*, 113 U. S. 40; 5 S. Ct. 346; H. & W. 265.

<sup>3</sup> *Lawrence v. Stagg*, 8 R. I. 256; *Newton v. Tolles*, 19 A. 1092; — N. H. —.

<sup>4</sup> *Varnum v. Highgate*, 65 Vt. 416; 26 A. 628; *Bingham v. Bingham*, 1 Ves. Sr. 126; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Martin v. McCormick*, 8 N. Y. 331; *Ankeny v. Clark*, 148 U. S. 345; 13 S. Ct. 617.

<sup>5</sup> *Clapp v. Hoffmann*, 159 Pa. St. 531; 28 A. 362; *Hamblin v. Bishop*, 41 F. 74; *Leal v. Terhush*, 52 Mich. 100; 17 N. W. 713.

<sup>6</sup> *Fritzler v. Robinson*, 70 Ia. 500; 31 N. W. 61.

chattel a mere supposition that the chattel possesses a particular quality is to be regarded as an essential part of the description or not, is rendered somewhat doubtful by the authorities. On principle, if the parties contract for the sale of a specific thing, the mere supposition that that thing possesses a particular quality is immaterial unless that quality is expressed in the description of the thing sold. Thus, where a diamond was sold for a dollar, in ignorance of the real character of the stone, the mistake as to the quality of the stone was held immaterial.<sup>1</sup> So where a note was sold, secured by a deed of trust, and the parties erroneously supposed that the deed gave a first lien on some stock, their mistake was held immaterial.<sup>2</sup> On the other hand, where a cow which was supposed to be barren was sold, and proved to be a breeding cow, of much greater value, the Michigan court held that the mistake went to the essence of the contract, although it did not appear that the contract specifically called for a barren cow.<sup>3</sup> The confusion that has arisen in the cases is due to a misunderstanding of the effect of mistake upon a contract. Mistake, in itself, as will be shown in the chapter on Rescission of Contracts, has no legal effect on contracts. There are many cases where mistake appears to produce legal results, but as far as contracts are concerned these results may all be shown to be due to some other cause. What the parties to a contract thought is of consequence only in so far as it concerns what they did. The province of the court is only to interpret the acts of the parties. When the court goes beyond the interpretation of legal acts, it is no longer concerned with the construction of contracts, but is in reality enforcing irrecusable obligations.

<sup>1</sup> *Wood v. Boynton*, 64 Wis. 265; H. & W. 257.

<sup>2</sup> *Sample v. Bridgforth*, 16 S. 876; — Miss. —.

<sup>3</sup> *Sherwood v. Walker*, 66 Mich. 568; 33 N. W. 919; H. & W. 249.

### § 5. Penalties and Liquidated Damages.

A contract may provide that upon a breach by one party he shall pay the other a fixed sum. This sum may be either a penalty, imposed to secure the performance of the contract; or it may be intended as an assessment in advance of the amount of damage that may be caused by the breach of contract. Whether the fixed sum is a penalty or liquidated damages is a question of construction.

In the case of an ordinary bond with condition subsequent, the bond in form acknowledges the existence of a debt from the obligor to the obligee, and provides that the obligation shall be discharged by performance of the condition. The common law courts used to enforce such bonds strictly in accordance with their terms; and an action of debt would lie for the amount of the bond upon the non-performance of the condition. In equity, however, the bond was regarded simply as security for the performance of the condition, and the obligee was not allowed to recover more than the actual damage he had sustained by the breach of condition. The equitable view now prevails in the common law courts, although the procedure in such cases varies considerably in different jurisdictions.

In the case of other contracts the use of the term "penalty" or "liquidated damages" is of little consequence.<sup>1</sup> The question is one of the intention of the parties in every case, and the following principles are applied in the construction of such contracts.

The fact that the damages are difficult of assessment tends to make the courts regard the fixed sum as liqui-

<sup>1</sup> *Kemble v. Farren*, 6 Bing. 141; *Law v. Redditch* (1892), 1 Q. B. 127; *Bignall v. Gould*, 119 U. S. 495; 7 S. Ct. 294; *Hennessy v. Metzger*, 152 Ill. 505; 38 N. E. 1058; *Sanford v. First Nat. Bank*, 63 N. W. 459; — Ia. —.

dated damages.<sup>1</sup> This rule applies where there are various stipulations of uncertain value.<sup>2</sup> But where there are several stipulations in an agreement, the damages for the non-performance of some of which are easily ascertainable by a jury, and the damages for the non-performance of the others cannot easily be measured, a sum named as damages for breach of any stipulation is treated as a penalty.<sup>3</sup> The fact that the damages fixed appear to be excessive does not in itself make the sum a penalty.<sup>4</sup> If the sum fixed is to be paid as damages on non-payment of a smaller sum, it is presumptively a penalty;<sup>5</sup> but a provision that a debt payable in instalments shall become due on non-payment of any instalment is not a penalty, for it merely affects the time of performance of the contract.<sup>6</sup>

#### § 6. Notice.

Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, his obligation is not conditional upon notice unless so stipulated. Thus where A. made a lease to B., and covenanted to keep the buildings on the demised premises in repair, having the right to enter to view the premises, A. was held bound to repair the buildings without notice.<sup>7</sup> So where A. promises to pay B. a certain sum when B. marries C.;<sup>8</sup> or to pay B. a certain sum when

<sup>1</sup> *Gobble v. Linder*, 76 Ill. 157; *Kemble v. Farren*, *supra*.

<sup>2</sup> *Reynolds v. Bridge*, 6 E. & B. 528.

<sup>3</sup> *Kemble v. Farren*, *supra*; *Higginson v. Weld*, 14 Gray, 165; *Lampman v. Cochran*, 16 N. Y. 275; *Trower v. Elder*, 77 Ill. 452.

<sup>4</sup> *Reynolds v. Bridge*, 6 E. & B. 528.

<sup>5</sup> *Kemble v. Farren*, *supra*.

<sup>6</sup> *Wallingford v. Mutual Society*, 5 A. C. 685.

<sup>7</sup> *Hayden v. Bradley*, 6 Gray, 425; W. 4.

<sup>8</sup> *Beresford v. Goodrouse*, 1 Rolle's Abr. 462, pl. 3, 4; L. 965.

C. does a certain act;<sup>1</sup> or to save B. harmless from certain suits.<sup>2</sup>

If, however, one promises to do a thing under circumstances or conditions which are within the peculiar knowledge of the opposite party, his promise is construed as conditional upon his receiving notice to perform. Thus, where a lessor covenants to repair, his covenant is conditional upon notice by the lessee, because the lessor has no means of knowing what repairs are necessary, not having the right to enter the premises.<sup>3</sup> So where A. agrees to pay B. a certain sum when B. shall return from London, B. must give notice of his return.<sup>4</sup> So a covenant by A. that he will not do any act to prejudice an insurance policy which B. may take out on A.'s life in any insurance company in London is conditional upon notice that such insurance has been effected.<sup>5</sup>

<sup>1</sup> *Haverleigh v. Leighton, Jenkins*, 311; L. 963; *Fowle v. Haggard*, Cro. Jac. 492; L. 966.

<sup>2</sup> *King v. Atkins*, 1 Siderf. 442; L. 968.

<sup>3</sup> *Makin v. Watkinson*, L. R. 6 Ex. 25; L. 978; *Hugall v. McLean*, 53 L. T. 94; W. 3.

<sup>4</sup> *Gable v. Morse*, 1 Bulstrode, 44; L. 963.

<sup>5</sup> *Vyse v. Wakefield*, 6 M. & W. 442; L. 969.



## CHAPTER VI.

## THE STATUTE OF FRAUDS.

## § 1. Introductory.

The purely formal part played by the court in the trial of cases was one of the peculiarities of primitive English procedure which has already been mentioned. One party or the other was ordered to prove his case, and, if certain forms were satisfied, the judgment of the court was given in favor of the party complying with such formal requirements. Originally, as we have seen, the only contracts which the courts recognized were real contracts, where the defendant had received a *quid pro quo*, and formal contracts, where the defendant's obligation was established by his own deed. At first the writing, and afterwards the defendant's seal, was regarded as the only means of proving the defendant's promise. The requirement of the seal as an essential part of a deed had the effect, of course, to make a mere written promise of no greater force than an oral promise; and both oral and written promises alike came to be enforced only by the new and constantly developing action of *assumpsit*. As this action originally sounded in tort, and as consideration came to be its essential feature, the form of the promise was of no consequence. Promises could be made by writing, by word of mouth, or by conduct without words, and were of equal effect in sustaining the action of *assumpsit*. Negotiable instruments alone were required to be in writing, and this only by

the custom of merchants, which had little influence on the general development of contract law.

The utter absence of any formal requirements for contracts enforceable by the action of *assumpsit* seems to have made it very difficult for the courts to determine the truth in cases where one party set up an oral contract, and the other denied its existence. Accordingly, in 1676, an act was passed for the prevention of frauds and perjuries. This act was the celebrated Statute of Frauds, 29 Car. II. c. 3, and has been most productive of litigation. In whole or in part this statute is generally in force to-day throughout the United States. Two sections of the act affect contracts the fourth and the seventeenth.

The fourth section is as follows:—

“No action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

The seventeenth section is as follows:—

“No contract for the sale of any goods, wares, or merchandises for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive

the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

We have then to consider, first, to what contracts these sections apply; secondly, what is required by the statute in the case of such contracts; and thirdly, the effect of the statute upon contracts which do not conform to its requirements.

## § 2. Contracts within the Statute.

And first as to the contracts included in the fourth section.

### (a) *Fourth Section.*

(1) EXECUTORS AND ADMINISTRATORS. — The first class of contracts is described as follows: "Any special promise by any executor or administrator to answer damages out of his own estate." Executors and administrators are liable for claims against the estates of their decedents only in their representative capacity. Judgment against an executor as such is *de bonis testatoris*. Executors and administrators, however, may bind themselves personally to pay such claims, and the statute requires such contracts to be in writing. To be within the statute the promise must be to answer for some liability of the estate; hence a promise by an executor to pay an heir for forbearing to contest the will of the testator need not be in writing.<sup>1</sup>

(2) GUARANTIES. — "Any special promise to answer for the debt, default, or miscarriage of another." This includes all contracts by which any person agrees to be responsible for any civil liability imposed by another. In every case within the statute there must be three par-

<sup>1</sup> *Bellows v. Sowles*, 57 Vt. 164; H. & W. 110.

ties involved: C., the creditor; B., the principal debtor; and A., the guarantor. A promise, to fall within the statute, must be a promise by A. to C. to answer to C. for B.'s liability to C.

There must be a real liability of B. to C. Hence a promise to answer for the "debt" of a married woman at common law is not on principle within the statute; though it has been held otherwise.<sup>1</sup> If credit is given to a married woman on the strength of her separate estate, however, the statute applies.<sup>2</sup> The guaranty of an infant's contract is within the statute, because an infant's contracts are not void, but only voidable.<sup>3</sup>

The promise must be a promise to pay the debt, and not to pay a certain sum for a collateral act. Thus, a promise to pay the plaintiff in a suit £50 to withdraw his suit need not be in writing.<sup>4</sup>

There is a conflict of authority as to whether a promise of indemnity is within the statute. If A. induces B. to go surety for C. on an obligation to D., it is held by some courts that A.'s promise to indemnify B. is within the statute.<sup>5</sup> The better rule, however, is that such contracts are not within the statute, because A.'s promise is really a promise to B. to pay any claim that D. may have against B.; so that the promise is to the debtor, B., and not to the creditor, D.<sup>6</sup> It is in

<sup>1</sup> *Maggs v. Ames*, 4 Bing. 470; 1 M. & P. 294; *Miller v. Long*, 45 Pa. St. 350.

<sup>2</sup> *Connerat v. Goldsmith*, 6 Ga. 14.

<sup>3</sup> *Dexter v. Blanchard*, 11 Allen, 365; *Scott v. Bryan*, 73 N. C. 582; *Brown v. Farmers', &c. Bank*, 31 S. W. 285; — Tex. —; *contra*, *King v. Summitt*, 73 Ind. 312.

<sup>4</sup> *Read v. Nash*, 1 Wils. 305.

<sup>5</sup> *May v. Williams*, 61 Miss. 125; H. & W. 113; *First Nat. Bank v. Bennett*, 33 Mich. 520; *Draughan v. Bunting*, 9 Ired. 10.

<sup>6</sup> *Thomas v. Cook*, 8 B. & C. 728; *Guild v. Conrad* (1894), 2 Q. B. 885, where the promise was to indemnify the plaintiff from liability if

reality not the contingent liability of C. to B., but the liability of B. to D. for which A. agrees to be answerable to B.

If the effect of the promise is to discharge the debtor's liability, it is not within the statute, which contemplates that the primary liability of the debtor shall be supplemented by the secondary liability of the guarantor. Hence if a novation takes place by which A. agrees to pay B.'s debt to C. in consideration that C. will discharge B. and accept A. as his debtor instead, A.'s promise is not within the statute.<sup>1</sup>

If the promise is made to the debtor, it is not within the statute. The promise in such a case imposes a direct and original obligation on the promisor to pay the amount of the debt, and the fact that the debtor designates that that amount shall be paid to the creditor has no different effect from a direction that the promisor shall deposit the money in a bank. The promise in such a case is not to answer for the liability of another, but to perform a certain act which has been designated by the debtor as the consideration for some promise or act on his own part. Thus, if A. sells property to B., and B. promises, in consideration of the sale, to pay A.'s debt to C., the statute does not apply to B.'s promise.<sup>2</sup>

It is often said that if the moving consideration for a promise to pay money be the liability of a third person, the promise must be in writing; but if there be a new consideration moving from the promisee to the

he would accept certain bills of exchange; *Aldrich v. Ames*, 9 Gray, 76; *Anderson v. Spence*, 72 Ind. 315; *Jones v. Bacon*, 145 N. Y. 446; 40 N. E. 216.

<sup>1</sup> *Eden v. Chaffee*, 160 Mass. 225; 35 N. E. 675; *Langdon v. Hughes*, 107 Mass. 272.

<sup>2</sup> *Wilson v. Bevans*, 58 Ill. 232; *Gold v. Phillips*, 10 Johns. 412; *Townsend v. Long*, 77 Pa. St. 143; *First Nat. Bank v. Chalmers*, 144 N. Y. 432; 39 N. E. 331; *Neagle v. Kelly*, 146 Ill. 460; 34 N. E. 947.

promisor, that makes it a new agreement, which is not within the statute. This doctrine is frequently laid down by the courts, but has been justly criticised. The statute applies to any special promise to answer for the debt, default, or miscarriage of another. Neither the motive inducing the promise, nor the consideration therefor, can determine whether the promise is in reality to answer for the liability of another. There are three classes of cases, however, which are said to come under the new consideration rule, which can easily be explained. Where A. owes B. and B. owes C., an agreement that A. shall pay to C. the debt due from him to B. is clearly not within the statute; A.'s promise is to pay his own debt, not the debt of another.<sup>1</sup> Again, where A. contracts a debt to B., which he agrees to pay by paying C.'s debt to B., the contract is not within the statute, for the same reason. Thus where B. surrenders to A. an insurance policy held by B. as security for a debt due from C. to B., in order that A. may collect the money on the policy, A.'s promise to B. to pay C.'s debt creates a debt of A.'s own, and is therefore not within the statute.<sup>2</sup> In such a case there is really a purchase by A. from B. of the insurance policy for the amount of C.'s debt. If, however, the transaction between A. and B. does not create a debt on A.'s part, A.'s promise is, it seems, within the statute. Now a simple contract debt can be created only by the receipt of a *quid pro quo*; so that if A. does not receive a *quid pro quo* from B. his promise to pay C.'s debt to B. is within the statute.<sup>3</sup> The courts are not unani-

<sup>1</sup> Clymer v. De Young, 54 Pa. St. 118; Sanders v. Classon, 13 Minn. 379.

<sup>2</sup> Borchsenius v. Canutson, 100 Ill. 82.

<sup>3</sup> Curtis v. Brown, 5 Cush. 488; Nelson v. Boynton, 3 Met. 396; Noyes v. Humphreys, 11 Gratt. 636; Maule v. Bucknell, 50 Pa. St. 39

mous, however, on this point. Thus, it has been held in Illinois that an oral promise to a surety to pay the debt of the principal, in consideration of the surety's abandoning his right to have the debt made by execution against the principal, is binding.<sup>1</sup>

The third class of cases in which the "new consideration" rule is said to take the promise out of the statute is where property of the debtor is surrendered to the promisor for the purpose of having the promisor pay the amount of the debt to the creditor out of the proceeds. In such a case, the defendant is in effect, if not technically, a trustee.<sup>2</sup>

If the promisor has a personal, immediate, and pecuniary interest in a transaction in which a third party is the original obligor, the statute does not apply. "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."<sup>3</sup> Thus where A. was a creditor of a mining company, and chiefly interested in the working of a mine, his promise to B. to pay B. for services rendered by the latter in transporting ore for the company was held not to come within the statute.<sup>4</sup> So where the defendant had employed a party to build a house, and *Kelsey v. Hibbs*, 13 Ohio St. 340; *Browne*, Statute of Frauds, §§ 212, 214e.

<sup>1</sup> *Bunting v. Darbyshire*, 75 Ill. 408.

<sup>2</sup> *Williams v. Leper*, 3 Burr. 1886; *Browne*, Statute of Frauds, § 206.

<sup>3</sup> *Clifford, J.*, in *Emerson v. Slater*, 22 How. 43.

<sup>4</sup> *Davis v. Patrick*, 141 U. S. 479; 12 S. Ct. 58.

on his failure the plaintiff, who was a sub-contractor, agreed to go on with the work if the defendant would pay him, the defendant's oral promise to pay was sustained.<sup>1</sup> The true test in such cases is whether the defendant is interested in the transaction in regard to which the promise is given, or whether he is totally unconnected with it except by means of his promise to pay the loss. In the former case the contract is one of indemnity, and is not within the statute; in the latter case the contract is one of guaranty, and comes within the statute.<sup>2</sup> This principle is illustrated in a late English case.<sup>3</sup> The plaintiffs, who were stockbrokers, made an oral agreement with the defendant that he should introduce clients to them, and that the plaintiffs should transact business on the Stock Exchange for the clients thus introduced. It was agreed between plaintiffs and defendant that defendant should receive half the commissions earned by plaintiffs on transactions for such clients, and should pay to plaintiffs half the loss which plaintiffs might suffer in consequence of such transactions. The contract was held not to be within the statute, partly on the ground that it was a contract of indemnity, and partly because it was to regulate the terms of the plaintiffs' employment.

If goods are sold or services rendered upon the sole credit of the defendant, the fact that the goods are delivered or the services rendered to a third person does not bring the defendant's promise to pay for them within the statute, for there is no liability on the part of the recipient of the goods or services to which the defendant's promise can be collateral.<sup>4</sup> But if any

<sup>1</sup> *Clifford v. Luhring*, 69 Ill. 401.

<sup>2</sup> *Sutton v. Grey* (1894), 1 Q. B. 285.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Hartley v. Varner*, 88 Ill. 561; *King v. Edmiston*, 88 Ill. 257.



credit be given to the third party, the defendant's promise must be in writing.<sup>1</sup>

(3) **MARRIAGE CONTRACTS.** — "To charge any person upon any agreement made upon consideration of marriage." This includes all promises made in consideration of actual marriage, or of promise of marriage, with the exception of mutual promises to marry. Mutual promises to marry were originally held to be within the statute,<sup>2</sup> but the modern doctrine excludes them.<sup>3</sup> If, however, the promise to marry is part of an ante-nuptial agreement, and dependent on it, it is within the statute.<sup>4</sup>

(4) **CONCERNING LANDS.** — "Upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." This clause is sweeping in its language, and applies to all contracts affecting in any way the title to any kind of interest in any kind of real property. The distinctions between realty and personalty need not be here discussed. Some illustrations of the application of the statute are here given, however. The statute applies to a contract for the transfer of a pre-emption right;<sup>5</sup> of an equitable interest;<sup>6</sup> and of a right of possession.<sup>7</sup> It applies to a contract by A. to procure a conveyance from B. to C., or to pay C. a certain sum;<sup>8</sup> to a contract for the sale of debentures

<sup>1</sup> *Anderson v. Hayman*, 1 H. Bl. 120; *Welch v. Marvin*, 36 Mich. 59; *Browne, Statute of Frauds*, § 197.

<sup>2</sup> *Philpott v. Wallet*, 3 Lev. 65.

<sup>3</sup> *Clark v. Pendleton*, 20 Conn. 495; *Browne, Statute of Frauds*, § 215 *a*.

<sup>4</sup> *Chase v. Fitz*, 132 Mass. 359.

<sup>5</sup> *Lester v. White*, 44 Ill. 464.

<sup>6</sup> *Dougherty v. Catlett*, 129 Ill. 431; 21 N. E. 932.

<sup>7</sup> *Howard v. Easton*, 7 Johns. 205; *Boyd v. Paul*, 125 Mo. 9; 28 S. W. 171.

<sup>8</sup> *Mather v. Scoles*, 35 Ind. 1.

which constitute a floating charge on the property of a company, such property comprising certain leaseholds.<sup>1</sup> An agreement to refrain from a certain use of land is not within the statute if the agreement does not create an easement.<sup>2</sup> A contract for a partnership to trade in lands is not within the statute;<sup>3</sup> but an agreement for the dissolution of a partnership which provides that one of the parties shall assign to the others a certain interest in land must be in writing.<sup>4</sup> A contract by A. with B., by which A. agrees to sell land to a purchaser whom B. shall find, and to pay B. all the money received over and above a fixed price, is not within the statute.<sup>5</sup> If the contract is entire, covering both realty and personalty, it is within the statute;<sup>6</sup> and so if the contract is in the alternative, and one alternative is within the statute.<sup>7</sup>

(5) PERFORMANCE WITHIN ONE YEAR. — "Upon any agreement that is not to be performed within one year from the making thereof." This clause applies only to contracts which by their terms cannot be performed within one year. Hence, if no time for performance is fixed, the statute does not apply.<sup>8</sup> Nor is a contract within the statute if the time for performance depends upon a contingency that may happen within one year, as in the case of a promise by a man to marry when he

<sup>1</sup> *Driver v. Broad* (1893), 1 Q. B. 744.

<sup>2</sup> *Hall v. Solomon*, 61 Conn. 476; 23 A. 876.

<sup>3</sup> *Dale v. Hamilton*, 5 Hare, 369; *Holmes v. McCray*, 51 Ind. 358; *Speyer v. Desjardins*, 144 Ill. 641; 32 N. E. 283; *contra*, *Smith v. Burnham*, 3 Sumner, 435.

<sup>4</sup> *Gray v. Smith*, 43 C. D. 208, per Kekewich, J.

<sup>5</sup> *Hayes v. Philips*, 37 Cal. 529; H. & W. 118.

<sup>6</sup> *Meyers v. Schemp*, 67 Ill. 469; *Thayer v. Rock*, 13 Wend. 53.

<sup>7</sup> *Mather v. Scoles*, *supra*.

<sup>8</sup> *McPherson v. Cox*, 96 U. S. 404; *Haussman v. Burnham*, 59 Conn. 117; 22 A. 1065.

recovers his health.<sup>1</sup> Nor does the statute apply to a contract to do something until the happening of a certain event, which may happen within the year.<sup>2</sup> Nor to a contract to do something "within" five years.<sup>3</sup>

A distinction should be drawn between the case of a contract to do something until the happening of a certain event, which may happen within the year, and that of a contract to continue for more than one year, but with a proviso that on the happening of a given event the contract shall be discharged. In the former case there is a limitation, in the latter a condition subsequent. Hence if the contract is by its terms not to be performed within one year, the fact that either party is given an option to terminate the contract within the year does not prevent the application of the statute.<sup>4</sup> So where a contract provided for the use of a patent cut-off on a steamboat, and provided that the user should pay a certain sum for the use of the patent during its continuance (which was to be twelve years), if the steamboat should last so long, the contract was held to be within the statute.<sup>5</sup>

The application of the foregoing principles has resulted in a conflict of authority. Where the contract is to do something for more than one year, but is of a personal character, so that it does not bind the representatives of the promisor, the question arises whether such contract is within the statute. On principle, it seems that the question is really one of construction; that if the life of

<sup>1</sup> *McConahey v. Griffey*, 82 Ia. 564; 48 N. W. 983.

<sup>2</sup> *Hutchinson v. Hutchinson*, 46 Me. 154; *Peters v. Westborough*, 19 Pick. 364; H. & W. 120.

<sup>3</sup> *Walker v. Johnson*, 96 U. S. 424.

<sup>4</sup> *Dobson v. Collis*, 1 H. & N. 81; *Birch v. Earl of Liverpool*, 9 B. & C. 392; *contra*, *Blake v. Voigt*, 134 N. Y. 69; 81 N. E. 256.

<sup>5</sup> *Packet Co. v. Sickles*, 5 Wall. 580.

the person is to be regarded as marking the limitation of the contract, the statute does not apply; but that if death is to be regarded as a condition subsequent putting an end to the contract, the statute should apply; and that whether death is to be treated as a limitation or as a condition should depend on the terms of the contract, and not upon any arbitrary rule. If A. promises to do something as long as he lives, A.'s life marks the natural duration of the obligation; and so if A. promises to do something as long as B. lives, B.'s life marks the duration of the obligation. The period of life is uncertain, and may be less than one year; on principle, therefore, the statute should not apply to the cases just put. If, however, A. promises to do something for a period of five years, the contract is not performed until the five years have elapsed, and A.'s death, or B.'s death, if the contract is personal in its character, operates simply as a condition discharging the contract; unless the contract is of such a character that it may properly be construed as extending only during the life of A. or B. Thus an agreement by A. to work for B. for five years is within the statute,<sup>1</sup> although death will discharge it; but an agreement by A. to support B. for five years,<sup>2</sup> or to refrain from doing something for five years, is not within the statute.<sup>3</sup>

If all that is to be done on one side may be performed within one year, the statute does not apply, although performance on the other side will require more than one year. This is the English doctrine, but the American courts are divided, some following the

<sup>1</sup> *Shute v. Dorr*, 5 Wend. 204; *Hill v. Hooper*, 1 Gray, 131.

<sup>2</sup> *Peters v. Westborough*, 19 Pick. 364; *H. & W.* 120; *Macgregor v. Macgregor*, 21 Q. B. D. 424.

<sup>3</sup> *Doyle v. Dixon*, 97 Mass. 208; *contra*, *Davey v. Shannon*, 4 Ex. D. 81; *Browne*, Statute of Frauds, § 282 b.

leading English case of *Donellan v. Read*,<sup>1</sup> while others hold that the statute does apply.<sup>2</sup> The better rule would seem to be that if the promise of the defendant is not capable of performance within one year, a writing should be required; but that if the defendant's promise is to be performed within one year, the fact that the plaintiff's promise is not to be performed within that time is immaterial.<sup>3</sup>

"One year" means one calendar year from the day on which the contract is made, excluding that day.<sup>4</sup>

(b) *Seventeenth Section.*

The seventeenth section of the statute applies to contracts "for the sale of any goods, wares, and merchandises for the price of £10 sterling or upwards."

(1) "CONTRACT FOR THE SALE OF."—It was at one time thought that the statute did not apply to contracts for the future delivery of goods,<sup>5</sup> but the cases were conflicting, and the law was settled to the contrary, in England, by Lord Tenterden's Act, 9 Geo. IV. c. 14, § 7, and by the Sales of Goods Act, 56 & 57 Vict. c. 71, § 4 (2).

Whether a contract is for the sale of goods or for the performance of services is a difficult question. The English rule is that if the subject-matter of the contract

<sup>1</sup> 3 B. & Ad. 899; *Curtis v. Sage*, 35 Ill. 22; *Grace v. Lynch*, 80 Wis. 166; 49 N. W. 751.

<sup>2</sup> *Whipple v. Parker*, 29 Mich. 369; *Pierce v. Paine*, 28 Vt. 34; *Marcy v. Marcy*, 9 Allen, 8; *Jackson Iron Co. v. Negaunee Concentrating Co.*, 65 F. 298; — U. S. App. —.

<sup>3</sup> *Browne*, Statute of Frauds, §§ 290, 290 a; *Sheehy v. Adarene*, 41 Vt. 541.

<sup>4</sup> *Dickson v. Frisbee*, 52 Ala. 165.

<sup>5</sup> *Clayton v. Andrews*, 4 Burr. 2101; W. C. S. 716; *contra*, *Rondeau v. Wyatt*, 2 H. Bl. 63; W. C. S. 717; *Garbutt v. Watson*, 5 B. & Ald. 613; W. C. S. 718.

is a chattel to be afterwards delivered, the contract is within the statute.<sup>1</sup> The Massachusetts rule is that a contract for the sale of articles now existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, and within the statute.<sup>2</sup> But if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute.<sup>3</sup> The New York rule is that an agreement for the sale of any commodity not in existence at the time, which the vendor is to manufacture or put in a condition to be delivered is not within the statute;<sup>4</sup> unless the acts to be done by the vendor do not alter the essential nature of the thing contracted for.<sup>5</sup>

(2) "GOODS, WARES, AND MERCHANDISES." — This includes all tangible personal property. The statute in England is held not to apply to incorporeal property, such as shares of stock.<sup>6</sup> In this country shares of stock are regarded as within the statute.<sup>7</sup> Some courts hold all choses in action to be within the statute,<sup>8</sup> but the better American rule limits the application of the statute to choses in action which have a visible and palpable form, like shares of stock.<sup>9</sup>

<sup>1</sup> *Lee v. Griffin*, 1 B. & S. 272; W. C. S. 722.

<sup>2</sup> *Mixer v. Howarth*, 21 Pick. 205; W. C. S. 725; *Goddard v. Binney*, 115 Mass. 450; W. C. S. 727; H. & W. 127.

<sup>3</sup> *Spencer v. Cone*, 1 Met. 283.

<sup>4</sup> *Parsons v. Loucks*, 48 N. Y. 17; W. C. S. 731.

<sup>5</sup> *Cooke v. Millard*, 65 N. Y. 352.

<sup>6</sup> *Humble v. Mitchell*, 11 A. & E. 205, W. C. S. 758.

<sup>7</sup> *Tisdale v. Harris*, 20 Pick. 9.

<sup>8</sup> *Greenwood v. Law*, 55 N. J. L. 168; 26 A. 134; H. & W. 131.

<sup>9</sup> *Baldwin v. Williams*, 3 Met. 365; *Somerby v. Buntin*, 118 Mass. 279; *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315; 13 S. Ct. 886.

(3) "FOR THE PRICE OF £10 STERLING AND UPWARDS." — Lord Tenterden's Act substituted the words "of the value" for "for the price," and the Sales of Goods Act follows Lord Tenterden's Act in this respect. Where several articles are sold at the same time and as part of the same transaction, if the total value exceeds the amount fixed by the statute, the statute applies.<sup>1</sup> In England a distinction is drawn in the case of auction-sales of successive lots,<sup>2</sup> the sale of each lot being held a separate contract; but this distinction is not universally recognized in this country.<sup>3</sup>

### § 3. Requirements of the Statute.

The requirements of the two sections of the statute are different. They resemble each other, however, in this, that a memorandum or note in writing of the agreement or bargain signed by the party to be charged or his lawfully authorized agent will take a contract out of the statute, whether such contract comes under the fourth or the seventeenth section. The requirements of the memorandum are practically the same in both sections, and the subject of the memorandum may be treated with reference to both sections.

(a) MEMORANDUM. — No particular form of words is required, nor any particular kind of document. Any writing containing the terms of the contract and the parties to it is sufficient. Thus the memorandum of a contract contained in a will is sufficient to charge the testator.<sup>4</sup> If an offer is in writing it is a sufficient memorandum to bind the party making it, though the

<sup>1</sup> *Baldey v. Parker*, 2 B. & C. 37; W. C. S. 759.

<sup>2</sup> *Emerson v. Heelis*, 2 Taunt. 38.

<sup>3</sup> *Jenness v. Wendell*, 51 N. H. 63; Benjamin on Sales (Bennett's 6th ed.) 129.

<sup>4</sup> *Re Hoyle* (1893), 1 Ch. 84; *Maddox v. Rowe*, 23 Ga. 431.

offer is accepted by parol.<sup>1</sup> If the memorandum is in the form of a deed, the deed must be delivered.<sup>2</sup> Bought and sold notes constitute a sufficient memorandum where they correspond and contain all the terms of the contract.<sup>3</sup>

The memorandum may consist of several different letters or papers, provided they are connected, consistent and complete, so that the contract can be clearly established without any resort to oral testimony.<sup>4</sup> If, however, one document refers to another in ambiguous terms, parol evidence is admissible to identify the latter, and so to connect the two documents.<sup>5</sup> And it has been held that parol evidence, if clear and satisfactory, may be received to connect two documents which do not directly refer to each other;<sup>6</sup> but this seems questionable.

The memorandum must show who are the parties to the contract.<sup>7</sup> It is sufficient if the obligee is described with reasonable certainty in the memorandum.<sup>8</sup> The agency of the party to whom the memorandum is addressed may be shown by parol.<sup>9</sup> Parol evidence is also admissible to show which party is buyer, and which is seller.<sup>10</sup>

<sup>1</sup> *Western Union Tel. Co. v. Chicago & P. R. R. Co.*, 86 Ill. 246.

<sup>2</sup> *Callanan v. Chapin*, 158 Mass. 113; 32 N. E. 941.

<sup>3</sup> *Bibb v. Allen*, 149 U. S. 481; 13 S. Ct. 950.

<sup>4</sup> *Boydell v. Drummond*, 11 East, 142; *Brown v. Whipple*, 58 N. H. 229; *W. C. S.* 973; *Ryan v. United States*, 136 U. S. 68; 10 S. Ct. 913.

<sup>5</sup> *Ridgway v. Wharton*, 6 H. L. C. 238; *Beckwith v. Talbot*, 95 U. S. 289; *W. C. S.* 970.

<sup>6</sup> *Oliver v. Hunting*, 44 C. D. 205; *W. C. S.* 955.

<sup>7</sup> *Champion v. Plummer*, 1 B. & P. N. R. 252; *W. C. S.* 871; *Vandenbergh v. Spooner*, L. R. 1 Ex. 316; *W. C. S.* 936.

<sup>8</sup> *Gowen v. Klous*, 101 Mass. 449.

<sup>9</sup> *Bateman v. Phillips*, 15 East, 272.

<sup>10</sup> *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446; *W. C. S.* 961;



The terms of the contract must appear in the memorandum, such as the time of performance<sup>1</sup> and the conditions of the bargain.<sup>2</sup> Whether the consideration must be expressed or not is a question which has given rise to a vast amount of litigation. It was held in *Wain v. Warlters*<sup>3</sup> that the provisions of the fourth section required that the memorandum should express the consideration. The decisions in this country are conflicting, and the matter is governed in many cases by express statutory enactment. It is hard to speak of principles where the authorities are so at variance, but the following propositions seem reasonable, if the statute does not settle the matter affirmatively. If there is no definite consideration agreed upon, none need be stated, for the law infers that a reasonable compensation is to be paid for the performance of the promise.<sup>4</sup> If the memorandum provides for the ascertainment of the compensation, it is sufficient.<sup>5</sup> If the memorandum acknowledges the receipt of the consideration it is sufficient.<sup>6</sup> If the consideration is obvious from the character of the contract, the memorandum is sufficient. Thus in a jurisdiction where the consideration must be expressed, if a guaranty of a note is written on the note before delivery, the consideration for the guaranty is sufficiently obvious, viz.: — the discounting of the note; but if the guaranty is written after delivery, the consideration does not appear from the character of the

*Newell v. Radford*, L. R. 3 C. P. 52; W. C. S. 936; *contra*, *Frank v. Eltringham*, 65 Miss. 281; *Mentz v. Newwitter*, 122 N. Y. 491, 497; W. C. S. 970, note.

<sup>1</sup> *O'Donnell v. Leeman*, 43 Me. 158; H. & W. 100.

<sup>2</sup> *Morton v. Dean*, 13 Met. 385.

<sup>3</sup> 5 East, 10.

<sup>4</sup> *Hoadley v. M'Laine*, 10 Bing. 482; W. C. S. 885.

<sup>5</sup> *Atwood v. Cobb*, 16 Pick. 227.

<sup>6</sup> *Fugate v. Hansford*, 3 Litt. (Ky.), 262.

transaction, and must therefore be expressed.<sup>1</sup> If the consideration has not been received, and does not clearly appear from the character of the transaction, it seems that the nature of the consideration ought to be stated. This is clearly established in the case of contracts for the sale of goods, where it is held that the price must be stated in the memorandum.<sup>2</sup> There is a distinction between expressing the nature of the consideration and setting forth the consideration itself. Thus in an executory contract of sale the consideration for the vendor's promise to sell at a certain price is the vendee's promise to buy at that price. Now the vendee's promise to buy need not be set forth in the memorandum;<sup>3</sup> but the price must be stated, because the promise of the vendor is not simply a promise to sell, but a promise to sell at a certain price.<sup>4</sup> This distinction, however, is sometimes ignored.<sup>5</sup>

The signature to the memorandum may be by initials;<sup>6</sup> may be in lead pencil;<sup>7</sup> and may be by a printed signature, if the adoption of such signature is shown.<sup>8</sup> The signature may be in any place.<sup>9</sup> The other party need

<sup>1</sup> *Moses v. Lawrence County Bank*, 149 U. S. 298; 13 S. Ct. 900.

<sup>2</sup> *Blagden v. Bradbear*, 12 Ves. 466; *Farwell v. Lowther*, 18 Ill. 252; *Peirce v. Corf*, L. R. 9 Q. B. 210; W. C. S. 942; *Hanson v. Marsh*, 40 Minn. 1; 40 N. W. 841; W. C. S. 997.

<sup>3</sup> *Egerton v. Mathews*, 6 East, 307; W. C. S. 870.

<sup>4</sup> *Browne*, Statute of Frauds, § 381 *a*; and see dissenting opinion of Field, C. J., in *Hayes v. Jackson*, 159 Mass. 451; 34 N. E. 683; W. C. S. 999, note.

<sup>5</sup> *Hayes v. Jackson*, *supra*.

<sup>6</sup> *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446; W. C. S. 961.

<sup>7</sup> *Merritt v. Clason*, 12 Johns. 102; W. C. S. 959; *Clason v. Bailey*, 14 Johns. 484; H. & W. 102.

<sup>8</sup> *Schneider v. Norris*, 2 M. & S. 286; W. C. S. 875. The word "subscribed" requires a written signature. *Davis v. Shields*, 26 Wend. 341.

<sup>9</sup> *Penniman v. Hartshorn*, 13 Mass. 87; *Clason v. Bailey*, *supra*; *Johnson v. Dodgson*, 2 M. & W. 653; W. C. S. 890.

not sign,<sup>1</sup> for the statute requires only the signature of the party to be charged. The signature may be made by an agent, and the agent may be appointed by parol, for the statute only requires him to be "lawfully authorized."<sup>2</sup> The agent may be any one but the opposite party;<sup>3</sup> and the same person may act as agent for both parties, as in the case of an auctioneer or broker, whose memorandum will bind both parties.<sup>4</sup>

The memorandum may be made at any time before suit is begun, but not afterwards.<sup>5</sup>

Contracts within the seventeenth section of the statute may be rendered enforceable not merely by a memorandum, but also by the acceptance and receipt of part of the goods by the purchaser, by the giving of earnest, and by part payment.

(b) ACCEPTANCE AND RECEIPT. — "Acceptance" is not used in the statute in its common acceptation; hence there may be an acceptance within the statute which will not operate as an acceptance so as to prevent the purchaser from repudiating the goods on the ground that they are not according to the contract.<sup>6</sup> The test seems to be whether there has been such a dealing with the goods as amounts to a recognition of the contract.<sup>7</sup>

<sup>1</sup> *Justice v. Lang*, 42 N. Y. 493; *Old Colony R. R. Co. v. Evans*, 6 Gray, 25; *Clason v. Bailey*, *supra*; *Perkins v. Hadsell*, 50 Ill. 217.

<sup>2</sup> *Hawkins v. Chace*, 19 Pick. 502.

<sup>3</sup> *Wright v. Dannah*, 2 Camp. 203; *W. C. S. 872*; *Bent v. Cobb*, 9 Gray, 397. In *Chase v. Lowell*, 7 Gray, 33, the plaintiff, as clerk of a committee of the city council signed a report employing him as city engineer, and this was held a sufficient memorandum.

<sup>4</sup> *O'Donnell v. Leeman*, 43 Me. 158; *H. & W. 100*; *Morton v. Dean*, 13 Met. 385; *M'Comb v. Wright*, 4 Johns. Ch. 659.

<sup>5</sup> *Bill v. Bament*, 9 M. & W. 36; *Bird v. Munroe*, 66 Me. 337; *H. & W. 92*; *W. C. S. 999*.

<sup>6</sup> *Page v. Morgan*, 15 Q. B. D. 228; *W. C. S. 813*; *Remick v. Sandford*, 120 Mass. 309, 316.

<sup>7</sup> *Page v. Morgan*, *supra*; *Taylor v. Smith* (1893), 2 Q. B. 65; *W.*

The precise meaning of the word "acceptance" has never been determined by the English courts;<sup>1</sup> and the decisions in this country, though numerous, do not afford any clearer definition.<sup>2</sup> "Receipt" denotes a change of possession, either actual or constructive. Both acceptance and receipt are required by the statute.

(c) **EARNEST AND PART PAYMENT.** — Earnest is some token given by the buyer to the seller and accepted by the latter to mark the final conclusive assent of both sides to the bargain.<sup>3</sup> Part payment goes in discharge of the buyer's obligation to pay for the goods; earnest is simply the token that the contract has been made. Part payment may be made by the buyer's discharging the seller from some existing liability; but not by a mere promise to discharge.<sup>4</sup> So a promise by the buyer to pay a debt of the seller to a third person is sufficient, where such promise is accepted by the seller in satisfaction of the price of the goods.<sup>5</sup>

**§ 4. Effect of the Statute.**

The statute does not require that the contracts to which it refers shall be in writing, but simply that there shall be some written evidence of certain kinds of oral contracts. Hence oral contracts within the statute are not void, but simply incapable of proof except by some written memorandum.<sup>6</sup> The benefit of the statute is purely personal, therefore, to the contracting party,

C. S. 819. This is the test established by the Sale of Goods Act, 56 & 57 Vict., c. 71, § 4 (3).

<sup>1</sup> Lord Herschell, in *Taylor v. Smith*, *supra*.

<sup>2</sup> See Benjamin on Sales (Bennett's 6th ed.), pp. 159-161.

<sup>3</sup> Benjamin on Sales, § 189.

<sup>4</sup> *Walker v. Nussey*, 16 M. & W. 302; W. C. S. 858.

<sup>5</sup> *Cotterill v. Stevens*, 10 Wis. 422.

<sup>6</sup> *Leroux v. Brown*, 12 C. B. 801; *Bird v. Munroe*, 66 Me. 337; *H. & W. 92*; W. C. S. 999; *Wheeler v. Frankenthal*, 78 Ill. 124.

who alone can set up the lack of written evidence to overthrow the contract.<sup>1</sup> There seems to be no difference in effect between the fourth and seventeenth sections of the statute.<sup>2</sup> Verbal contracts within the statute cannot be made available in any way as a cause of action or ground of defence.<sup>3</sup>

If part of a contract consists of promises within the statute, and the rest of promises, to which the statute does not apply, when the promises within the statute have been performed, the remaining stipulations become enforceable.<sup>4</sup> Thus where the cause of action is really a debt arising from the acceptance of goods or services, the fact that the promise to pay for such goods or services was within the statute will not prevent a recovery of the stipulated price.<sup>5</sup> If, however, the transaction does not create a debt, there seems to be no good reason for allowing a recovery on the contract simply because the consideration is executed. Performance of part of the contract does not, of course, render another part, which is within the statute, enforceable at law.<sup>6</sup> The remedy of the party who has performed in such a case is in quasi-contract.<sup>7</sup>

Although performance of part of the contract does not make it enforceable, a party may, by his own conduct,

<sup>1</sup> *Amsinck v. American Insurance Co.*, 129 Mass. 185; *W. C. S.* 763; *Browne*, Statute of Frauds, § 128.

<sup>2</sup> *Ibid.*, § 115.

<sup>3</sup> *Ibid.*, § 131; *King v. Welcome*, 5 Gray, 41; *McGinnis v. Fernandes*, 126 Ill. 228; 19 N. E. 44; *Chicago Attachment Co. v. Davis S. M. Co.*, 142 Ill. 171; 31 N. E. 438; *contra*, *Mack v. Bragg*, 30 Vt. 571; *Abbott v. Inskip*, 29 Ohio St. 59.

<sup>4</sup> *Worden v. Sharp*, 56 Ill. 104; *Remington v. Palmer*, 62 N. Y. 31; *Browne*, Statute of Frauds, § 117.

<sup>5</sup> *Leake*, Contracts, 255; *Souch v. Strawbridge*, 2 C. B. 808.

<sup>6</sup> *Marcy v. Marcy*, 9 Allen, 8; *Emery v. Smith*, 46 N. H. 151; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421.

<sup>7</sup> *King v. Welcome*, *supra*.

be estopped from setting up the defence of the statute. If the defendant by his conduct induces the plaintiff to change his situation in reliance upon the supposition that the defendant regards his contract as binding, a court of equity will not allow the defendant to set up the statute as a defence.<sup>1</sup> What change of position on the part of the plaintiff will raise such an equitable estoppel in his favor is a difficult question. The acts done in reliance on the contract need not be in performance thereof.<sup>2</sup> But there must be some act, apparently, which changes the plaintiff's situation in some way so that he cannot be restored thereto by the mere payment of money. In the case of a sale of land, taking possession of the land and making lasting and valuable improvements thereon will take the contract out of the statute.<sup>3</sup> The transfer of possession in itself will give a court of equity jurisdiction, not to enforce the contract,<sup>4</sup> but to make the possession conform to the agreement of the parties.<sup>5</sup> Mere payment of the consideration will not render a contract within the statute enforceable.<sup>6</sup> Nor will the rendition of services render binding a promise within the statute made in consideration of such services.<sup>7</sup> Marriage has been held insufficient to make an oral promise to make a settlement enforceable;<sup>8</sup> though this seems illogical.<sup>9</sup>

<sup>1</sup> *Glass v. Hulbert*, 102 Mass. 24.

<sup>2</sup> *Swain v. Seamens*, 9 Wall. 254.

<sup>3</sup> *Ahl v. Johnson*, 20 How. 511; *Smith v. West*, 103 Ill. 332; *Townsend v. Vanderwecker*, 160 U. S. 171.

<sup>4</sup> *Lavery v. Pursell*, 39 C. D. 508.

<sup>5</sup> *Ungley v. Ungley*, 5 C. D. 887.

<sup>6</sup> *Glass v. Hulbert*, *supra*; *Temple v. Johnson*, 71 Ill. 13; *Jourdain v. Fox*, 90 Wis. 99; 62 N. W. 936.

<sup>7</sup> *Maddison v. Alderson*, 8 A. C. 467; but see *Warren v. Warren*, 105 Ill. 568.

<sup>8</sup> *Finch v. Finch*, 10 Ohio St. 501; *Browne*, Statute of Frauds, § 459.

<sup>9</sup> The doctrine of part performance is thus stated by Sir Edward Fry (*Specific Performance*, § 580):—

**214 ELEMENTS OF THE LAW OF CONTRACTS.**

(1) The acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title;

(2) They must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing;

(3) The contract to which they refer must be such as in its own nature is enforceable by the court; and

(4) There must be proper parol evidence of the contract which is let in by the acts of part performance.

## CHAPTER VII.

## THE OPERATION OF CONTRACT.

HAVING seen what acts give rise to contractual obligation, we have now to consider what parties are affected by the existence of such obligation. This question must be considered, first, with reference to the parties who are bound by the contract; and second, with reference to the parties who may enforce the contract.

**§ 1. As to Obligations.**

Inasmuch as contractual obligation is the result of a voluntary act, no one can be bound by such obligation unless his own act has given rise to the obligation. In other words, no one can be bound by a contract who is not a party to it.<sup>1</sup>

The existence of a contract between two parties may impose an obligation on other parties not to interfere with the contract. Indeed it is now generally recognized that malicious interference with a contract by a third party is actionable.<sup>2</sup> Such interference, however, constitutes a tort, and is a breach, not of the contractual, but of an irrecusable obligation.

<sup>1</sup> *Schmalig v. Thomlinson*, 6 Taunt. 147. The act of an agent is regarded as the act of his principal, so that agency furnishes no real exception.

<sup>2</sup> *Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 333; *Walker v. Cronin*, 107 Mass. 555; H. & W. 416; *Angle v. Chicago, &c. Ry. Co.*, 151 U. S. 1; *Jones v. Stanley*, 76 N. C. 355; H. & W. 418; *contra*, *Chambers v. Baldwin*, 91 Ky. 121; 15 S. W. 57; *Boyson v. Thorn*, 98 Cal. 578; 33 P. 492.



## § 2. As to Rights.

(a) AT COMMON LAW AND IN EQUITY. — The common law rule is that no one can enforce a contract who is not a party thereto.<sup>1</sup> In the case of formal contracts this rule rests on the fact that the deed itself determines the person to whom the obligor binds himself, and that the obligation can therefore extend only to the obligee named. In the case of simple contracts, the promise determines the consideration, and extends only to the person who furnishes that consideration. The equitable rule is the same as that at common law.<sup>2</sup>

(b) EXCEPTIONS. — Such being the common law rule, we have to consider what exceptions there are. The only exception now recognized in Massachusetts is "where the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors."<sup>3</sup> This exception is really no exception at all, since the cases it includes are those where the obligation which the plaintiff seeks to enforce is not contractual in its nature.

<sup>1</sup> *Price v. Easton*, 4 B. & Ad. 333; L. 172; *Tweddle v. Atkinson*, 1 B. & S. 393; L. 174; *Exchange Bank v. Rice*, 107 Mass. 37; W. 520; *Borden v. Boardman*, 157 Mass. 410; 32 N. E. 469; W. 524; H. & W. 435; *Halsted v. Francis*, 31 Mich. 113; *Wheeler v. Stewart*, 94 Mich. 445; 54 N. W. 172; *Linneman v. Moross*, 98 Mich. 178; 51 N. W. 103; *Adams v. Kuehn*, 119 Pa. St. 76; 13 A. 184. The case of agency need not be here considered.

<sup>2</sup> *Re Rotherham Alum Co.*, 25 C. D. 104, 111; *Re Empress Engineering Co.*, 16 C. D. 125, 129. There is an exception in the case of marriage settlements. *Pollock, Contracts*, 188, 199.

<sup>3</sup> *Exchange Bank v. Rice*, *supra*.

Another exception was recognized in early cases both in England and Massachusetts, viz.:—that a son might sue on a promise made to his father for his benefit. This exception is no longer recognized in England<sup>1</sup> or in Massachusetts,<sup>2</sup> and it has no foundation in principle.

(c) RIGHT OF THE "BENEFICIARY" TO SUE. — In most of the States, however, there is a broad exception to the common law rule. This exception is really rather a modification of the general rule by judicial legislation. The leading case in support of this modification of the common law is *Lawrence v. Fox*,<sup>3</sup> in which the New York court laid down the principle "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." This rule has no foundation in principle, and is a pure case of judicial legislation; but the rule has been widely adopted throughout the United States, and has led to confusion worse confounded in the decisions, as arbitrary rules are very apt to do. Where the New York rule prevails there are two things to be considered: first, to what contracts the rule applies; and secondly, what is the nature of the third party's right to sue.

(1) *Cases in which such Right is Recognized.* — The cases in which a third party is allowed to sue on a contract seem confined to two classes. In the first class of contracts, the object of the contract is the benefit of the third party. In the second class, the performance of the contract must go to discharge some legal obligation of the promisee to the party suing.

In the following cases it has been held that the object of the contract was to benefit the party suing, and the rule in *Lawrence v. Fox* has been applied.

<sup>1</sup> *Tweddle v. Atkinson*, 1 B. & S. 393; L. 174.

<sup>2</sup> *Marston v. Bigelow*, 150 Mass. 45, 53; 22 N. E. 71.

<sup>3</sup> 20 N. Y. 268; W. 526; H. & W. 422.

## 218 ELEMENTS OF THE LAW OF CONTRACTS.

Where a city covenanted with the State to pay damages resulting from the making of certain improvements, it was held that a person damaged by the improvements could sue the city on its covenant.<sup>1</sup>

So where contractors with the State assume to do certain things, it has been held that the contractors are liable to a person injured by their non-performance; but this rule rests on public policy as well as on the decision in *Lawrence v. Fox*.<sup>2</sup>

Where the father of an illegitimate child made a contract with the mother for the support of the child, an action on the contract by the child against the father was allowed.<sup>3</sup>

The latest cases in New York seem to have abandoned the idea that a stranger to a contract can sue upon it simply because it is for his benefit. Thus it has been held that the trustees of a church cannot sue upon a subscription paper for the benefit of the church, where they are not parties to the contract.<sup>4</sup> Again, where the owner of land conveyed it to her grandsons, taking a mortgage securing an annuity to herself, and also providing that the grantees should pay a certain sum to her two granddaughters after her death, it was held that the granddaughters could not enforce the mortgage.<sup>5</sup> The court says, "To maintain the action by the third person, there must be (some) liability to him on the part of the promisee."

In the second class of cases where a stranger to a contract can sue, the performance of the contract must

<sup>1</sup> *Coster v. Mayor of Albany*, 43 N. Y. 399.

<sup>2</sup> *Little v. Banks*, 85 N. Y. 258.

<sup>3</sup> *Benge v. Hiatt*, 82 Ky. 666; *Todd v. Weber*, 95 N. Y. 181.

<sup>4</sup> *Presbyterian Church v. Cooper*, 112 N. Y. 517; 20 N. E. 352; W. 544; *Lawrence v. Fox* was entirely ignored in this case.

<sup>5</sup> *Townsend v. Rackham*, 143 N. Y. 516; 38 N. E. 731.

go in discharge of a legal obligation of the promisee to the party suing. The following cases show where the action is allowed.

Where a railroad company agreed with a city to pay part of a policeman's salary, the policeman was allowed to sue on the contract.<sup>1</sup>

Where one insurance company made a contract with another by which the first company agreed to pay the losses of policy-holders in the second, the policy-holders were allowed to sue the second company on the contract.<sup>2</sup>

Where the promisee and his wife had separated, a contract by the promisor to support the wife was held enforceable by the wife.<sup>3</sup> The performance of the contract went in discharge of the promisee's obligation to support his wife.

The most common instance where the third party is allowed to sue is where a mortgagor sells land, and his grantor assumes and agrees to pay the mortgage. In such cases the mortgagee is generally allowed to sue the purchaser on his contract to pay the mortgage.<sup>4</sup> The same rule applies when there is a contract by the promisor to discharge any other obligation of the promisee.<sup>5</sup>

If a case does not fall within one of the two classes

<sup>1</sup> *Porter v. Richmond, &c. R. R. Co.*, 97 N. C. 46; 2 S. E. 374.

<sup>2</sup> *Barnes v. Hekla Ins. Co.*, 56 Minn. 38; 57 N. W. 314.

<sup>3</sup> *Coleman v. Whitney*, 62 Vt. 123; 20 A. 322.

<sup>4</sup> *Burr v. Beers*, 24 N. Y. 178; *Campbell v. Smith*, 71 N. Y. 26; *Schley v. Fryer*, 100 N. Y. 71; 2 N. E. 280; *Flint v. Cadenasso*, 64 Cal. 83; 28 P. 62; *Ellis v. Johnson*, 96 Ind. 377; *State v. Davis*, 96 Ind. 539; *Wright v. Briggs*, 99 Ind. 563; *Daub v. Englebach*, 109 Ill. 267; *Fitzgerald v. Barker*, 85 Mo. 13; *Gifford v. Corrigan*, 117 N. Y. 257; 22 N. E. 756; W. 535; *Stephenson v. Elliott*, 53 Kans. 550; 36 P. 980.

<sup>5</sup> *Emmitt v. Brophy*, 42 Ohio St. 82; *Arnold v. Nichols*, 64 N. Y. 117; *Bassett v. Hughes*, 43 Wis. 319; W. 541; H. & W. 428.

already described, a stranger to the contract cannot sue upon it, even though he might be benefited by the performance of the contract.<sup>1</sup> This principle is illustrated in the following cases.

Where A.'s husband conveys land to B., and B. covenants to pay all incumbrances on the premises, A. cannot sue B. for breach of his covenant resulting in the loss of her inchoate right of dower by sale of the land in a foreclosure suit.<sup>2</sup> The husband owes no duty to his wife to protect her right of dower, so that the covenant does not go in discharge of any obligation of the promisee to the party suing.

Where all A.'s creditors agree not to sue him without the concurrence of a majority of the creditors, this contract does not inure to the benefit of the debtor, and he cannot take advantage of it.<sup>3</sup>

Where B., C., and D. are joint indorsers of A.'s notes and make an agreement among themselves that, if A. fails to pay, each will pay his share, and if any one pays more than his share he shall recover from the others, and a mortgage is given to secure the performance of this agreement, the mortgage cannot be enforced by the holders of A.'s notes.<sup>4</sup> The contract is for the protection of the indorsers, not of A., and each indorser's promise is in effect a promise to perform his own obligation, and not to perform A.'s obligation.

Where the grantee of land subject to a mortgage does not assume it, a stipulation in a conveyance by him that his grantee shall assume the mortgage, does not make the latter liable to the mortgagee.<sup>5</sup> The promise

<sup>1</sup> *Carter v. Holahan*, 92 N. Y. 498; *Lorillard v. Clyde*, 122 N. Y. 498; 25 N. E. 917.

<sup>2</sup> *Durnherr v. Rau*, 135 N. Y. 219; 32 N. E. 49; W. 540.

<sup>3</sup> *Johnson v. Bamberger*, 19 S. W. 920 (Ark.).

<sup>4</sup> *Seward v. Huntington*, 94 N. Y. 104.

<sup>5</sup> *Nelson v. Rogers*, 47 Minn. 103; 49 N. W. 526; *Brown v. Still-*

does not go in discharge of any obligation of the promisee.

Where B. agrees to furnish C. such sums of money as may be necessary to pay C.'s current expenses, a person who furnishes C. with goods cannot sue B.<sup>1</sup>

A contract between A. and B. to subscribe for stock in a corporation cannot be enforced by the corporation.<sup>2</sup>

Where corporation A. leases a railroad to corporation B., and corporation B. guarantees to pay to corporation A. an annual amount equal to a 10% dividend on the capital stock of corporation A., a stockholder in corporation A. cannot enforce this contract because he has no right to dividends as against corporation A., there being no legal obligation on the part of a corporation to pay dividends.<sup>3</sup>

Where A. agrees to pay a certain proportion of B.'s indebtedness, C., a creditor of B., cannot sue A. on this contract, because there is no agreement to pay any special amount in proportion of the claim of any individual creditor; and while the performance of the contract *may* go in discharge of B.'s obligation to C. it will not necessarily do so. It is essential that the performance of the contract *must* go in discharge of such obligation.<sup>4</sup>

Where A. promises to pay B.'s debts and to make certain advances, the total amount to be paid by A. to

man, 43 Minn. 126; 45 N. W. 2; *Vrooman v. Turner*, 69 N. Y. 280; *Carter v. Holahan*, 92 N. Y. 498; *contra*, *Merriman v. Moore*, 90 Pa. St. 78; *Brewer v. Maurer*, 38 Ohio St. 543 (dictum); *Dean v. Walker*, 107 Ill. 540 (dictum).

<sup>1</sup> *Burton v. Larkin*, 36 Kans. 246; 13 P. 398.

<sup>2</sup> *Morawetz, Corporations*, § 49; *Lake Ontario R. R. Co. v. Curtis*, 80 N. Y. 220.

<sup>3</sup> *Beveridge v. N. Y. El. R. Co.*, 112 N. Y. 1; 16 N. E. 489; *Flagg v. Manhattan Ry. Co.*, 20 Blatchf. 142.

<sup>4</sup> *Wheat v. Rice*, 97 N. Y. 296; *Serviss v. McDonnell*, 107 N. Y. 260; 14 N. E. 314.

be limited to a certain sum, B.'s creditors cannot sue A. on this contract. The contract is in effect simply to advance a certain sum of money, and not to pay any specific debt of B.'s.<sup>1</sup>

Where A. agrees with B. to erect buildings and apply the money received for materials and labor, "to the end" that there shall be no liens, and C. guarantees to B. the performance of A.'s contract, D., who furnishes material for the buildings, cannot sue C. The contract does not provide for the payment of D.'s claim, but simply that the money received by B. shall be applied in payment of similar claims.<sup>2</sup>

Where A. simply promises B. to indemnify him against a claim of C., C. cannot sue A.<sup>3</sup> Thus where A. gave a bond to B., conditioned for the payment of B.'s note to C., the court held that C. could not sue A. on the bond for the reason that there was no *promise* by A. to pay the note to C.<sup>4</sup> *A fortiori*, where D. guarantees such a bond, C. cannot sue D. on his guaranty.<sup>5</sup> But if A. *promises* B. to pay B.'s note to C., and D. guarantees the performance of A.'s promise, C. can sue D. on the guaranty.<sup>6</sup>

It has been held in Nebraska that where a bond is given to a city by contractors, conditioned that they will pay for all labor and material furnished, persons furnishing labor and material can sue on the bond;<sup>7</sup> but the Minnesota courts take the opposite view.<sup>8</sup> In

<sup>1</sup> Washburn v. Interstate Investment Co., 26 Or. 436; 38 P. 620.

<sup>2</sup> Weller v. Goble, 66 Ia. 113; 23 N. W. 290.

<sup>3</sup> Berry v. Brown, 107 N. Y. 659; 14 N. E. 289; Merrill v. Green, 55 N. Y. 270; Simson v. Brown, 68 N. Y. 355.

<sup>4</sup> Turk v. Ridge, 41 N. Y. 201; Merrill v. Green, *supra*.

<sup>5</sup> Simson v. Brown, *supra*.

<sup>6</sup> Claffin v. Olstrom, 54 N. Y. 581.

<sup>7</sup> Lyman v. Lincoln, 38 Neb. 794; 57 N. W. 531.

<sup>8</sup> Jefferson v. Asch, 53 Minn. 446; 55 N.W. 604; Union Ry. Storage Co. v. McDermott, 53 Minn. 407; 55 N. W. 606.

Iowa C. may sue on the bond by virtue of a statute to that effect.<sup>1</sup>

Where a contract for the sale of land by A. to B. recites that part of the price "is going to C.," C. cannot sue B.<sup>2</sup>

(2) *Nature of such Right.*—Having seen on what contracts a stranger is and is not allowed to sue in many American courts, we have to consider the theory upon which such actions are allowed.

In the cases where the third party is in reality one for whose benefit the contract is made there seems to be an extension of the idea of trust by the common law courts. In many of the States statutes provide that "the real party in interest must sue;" and it is generally held that the beneficiary is the real party in interest. Indeed, in Missouri the promisee is declared a trustee for the beneficiary.<sup>3</sup> In Indiana the court says there is an "executed gift of the promise to the beneficiary."<sup>4</sup> In Illinois the court says that "such a promise invests the person for whose use it is made with an immediate interest and right, as though the promise had been made to him."<sup>5</sup>

The New Hampshire doctrine is that a third party can sue on a contract only where there has been a novation. If A. promises B. to pay B.'s debt to C., and C. assents to this arrangement, B. is thereby discharged, and A. is substituted as C.'s debtor. C.'s assent, it is held, may be given after the agreement between A. and B., but must be given before suit is begun.<sup>6</sup> It seems

<sup>1</sup> *Jordan v. Kavanaugh*, 63 Ia. 152; 18 N. W. 851; *Baker v. Bryan*, 64 Ia. 561; 21 N. W. 83.

<sup>2</sup> *Crandall v. Payne*, 154 Ill. 627; 39 N. E. 601.

<sup>3</sup> *Rogers v. Goenell*, 51 Mo. 466 (by statute).

<sup>4</sup> *Pruitt v. Pruitt*, 91 Ind. 595.

<sup>5</sup> *Bay v. Williams*, 112 Ill. 91, 97.

<sup>6</sup> *Warren v. Batchelder*, 16 N. H. 580; *Butterfield v. Hartshorn*, 7 N. H. 345; *Clough v. Giles*, 64 N. H. 73; 5 A. 835.



very questionable whether this theory of novation can be supported.

In Maine, on the other hand, in a case like that just put, A.'s promise to B. imposes on A. an obligation to C., and C. has his election to sue either B. or A., but cannot sue both.<sup>1</sup>

In Rhode Island the court hesitates between the Maine and the New Hampshire doctrine, but holds that C. can sue only one of the parties; and that in order to obtain the benefit of the new contract he must show a release of the old, whether the view of the Maine or of the New Hampshire courts be adopted.<sup>2</sup>

Where the contract between A. and B. involves a promise by A. to perform B.'s obligation to C., the right of C. to sue A. seems largely influenced by the doctrine of subrogation. Even in those jurisdictions where the common law rule prevails, and a stranger to the contract cannot sue upon it, C. is allowed to avail himself in equity of B.'s rights against A. wherever a case of subrogation arises. The ground upon which equity gives C. a right against A., however, is not that C. is regarded as having any right by virtue of the contract between A. and B., but that in equity a creditor has a right to the benefit of any obligation or security given by the principal to the surety for the payment of the debt. In equity, the assumption of a mortgage by a vendee is regarded, as between vendor and vendee, as making the vendee primarily liable for the debt, and placing the mortgagor in the position of surety for the vendee, so that the mortgagee is subrogated to the rights of the mortgagor, and may compel the vendee to pay the mortgage.<sup>3</sup> Subrogation, where the common

<sup>1</sup> *Bohanan v. Pope*, 42 Me. 93.

<sup>2</sup> *Wood v. Moriarty*, 15 R. I. 518; 9 A. 427; H. & W. 430.

<sup>3</sup> *Keller v. Ashford*, 133 U. S. 610; 10 S. Ct. 494.

law doctrine prevails, is the only right which the mortgagee can acquire by the vendee's assumption of the mortgage.<sup>1</sup> In other jurisdictions, subrogation is the only remedy of a stranger to a sealed contract, but an action at law is allowed on a simple contract.<sup>2</sup> In other jurisdictions a stranger may sue on any contract, whether under seal or not, if such contract falls within one of the two classes previously described.<sup>3</sup> In such jurisdictions the equitable right of subrogation is said to be "swallowed up in the greater equity of the legal right founded on the theory of a promise made for the benefit of the creditor."<sup>4</sup>

There are important differences to be noticed between the right of subrogation, and the right of a third party to sue on a contract. The former is equitable, the latter legal. Where the right of subrogation exists, the mortgagee stands strictly in the shoes of the mortgagor, and hence if the mortgagor releases his vendee from his assumption of the mortgage, the mortgagee's rights against the vendee are destroyed,<sup>5</sup> unless the release is fraudulent.<sup>6</sup> Where the legal right of the stranger to the contract is recognized, it is held in some cases that this right springs from the contract itself, and cannot be destroyed by any act of the promisee.<sup>7</sup> In Indiana the third party is regarded as having an interest by virtue of the contract only when the contract is intended

<sup>1</sup> *Ibid.*; *Willard v. Wood*, 135 U. S. 309; 10 S. Ct. 831.

<sup>2</sup> *Joslin v. New Jersey Car Spring Co.*, 36 N. J. L. 141; *Harnis v. McCormick*, 132 Ill. 104; 22 N. E. 511.

<sup>3</sup> *Bassett v. Hughes*, 43 Wis. 319; *W. 541*; *H. & W. 428*; *Carter v. Mayor of Albany*, 43 N. Y. 399; *Garvin v. Mobley*, 1 Bush, 48.

<sup>4</sup> *Gifford v. Corrigan*, 117 N. Y. 257; 22 N. E. 756; *W. 535*.

<sup>5</sup> *Youngs v. Trustees*, 31 N. J. Eq. 290; *O'Neill v. Clark*, 33 N. J. Eq. 444.

<sup>6</sup> *Trustees v. Anderson*, 30 N. J. Eq. 366.

<sup>7</sup> *Bay v. Williams*, 112 Ill. 91; *Bohanan v. Pope*, 42 Me. 93.

for the sole benefit of such third party. In such cases, a release by the promisee cannot affect the rights of the beneficiary;<sup>1</sup> while if the promisee has an interest in the performance of the contract he may release the promisor at any time before the third party has assented to the contract.<sup>2</sup>

In New York and many other States a release by the promisee will destroy the rights of the third party if such release is made before the third party has assented to the contract.<sup>3</sup> After he has assented, his rights cannot be affected by any act of the promisee.<sup>4</sup>

The outcome of *Lawrence v. Fox* in New York seems to be that a legal right of a stranger to a contract to sue is recognized; that the courts have been influenced in their decisions as to the extent of this right by the equitable rules governing subrogation; and that the tendency of the decisions is to minimize the differences between this legal right and the generally recognized right of subrogation.

(d) DOCTRINE OF THE FEDERAL COURTS. — The law of the Federal Courts as to the right of a third party to sue on a contract does not seem clearly settled. In *Hendrick v. Lindsay*,<sup>5</sup> the United States Supreme Court says that while no one can sue on a promise under seal who is not named in the deed, "the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." In *National*

<sup>1</sup> *Pruitt v. Pruitt*, 91 Ind. 595.

<sup>2</sup> *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496.

<sup>3</sup> *Brewer v. Maurer*, 38 Ohio St. 543; *Comley v. Dazian*, 114 N. Y. 161; 21 N. E. 135; *Berkshire Life Ins. Co. v. Hutchings*, *supra*.

<sup>4</sup> *Dodge v. Moss*, 82 Ky. 441; *Gifford v. Corrigan*, 117 N. Y. 257; 22 N. E. 756; *W. 535*; *N. Y. Life Ins. Co. v. Aitkin*, 125 N. Y. 660; 26 N. E. 732; *Basset v. Hughes*, 43 Wis. 319; *W. 541*; *H. & W. 428*.

<sup>5</sup> 93 U. S. 143.

*Bank v. Grand Lodge*,<sup>1</sup> the court says that while the general rule is that a stranger to the contract cannot sue upon it, "there are confessedly many exceptions" to the rule. The two exceptions mentioned by the court are, first, the so-called exception when the defendant has assets to which the plaintiff is really entitled; and second, "where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third." The court goes on to say, "But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue." This language is quoted with approval in *Keller v. Ashford*,<sup>2</sup> where the court held that the sole right of a mortgagee against the grantor of the mortgagor who assumes the mortgage, is in equity, and rests on the equitable doctrine of subrogation. The general rules laid down by the Supreme Court thus coincide with the common law rules prevailing in England, Massachusetts, and Michigan; but it seems uncertain whether the second exception in *National Bank v. Grand Lodge* would really be treated as an exception if the case should actually come before the court.

There are certain important questions on which the decisions of the Supreme Court throw little light. In

<sup>1</sup> 98 U. S. 123; W. 518.

<sup>2</sup> 133 U. S. 610; 10 S. Ct. 494; *Willard v. Wood*, 135 U. S. 309; 10 S. Ct. 831.

*Willard v. Wood*<sup>1</sup> the court holds that the remedy of a third party on a contract is determined by the *lex fori*; and that in the District of Columbia the sole remedy of the mortgagee against a purchaser who assumes the mortgage is in equity. But the contract in that case was made in New York; and in New York the right of the third party is a legal right to sue on the contract, and he is not compelled to resort to the doctrine of subrogation in order to recover. It is clear that a third party may be able to sue on a contract in New York, and yet not be able to sue in equity in the District of Columbia, because in the District of Columbia he would have to show himself entitled to subrogation; while in New York he is not bound to establish a right to subrogation in order to enforce the contract. It would seem, therefore, that the decision in *Willard v. Wood* has the effect to deprive a man in the District of Columbia of substantive rights which he has acquired in New York.

On the other hand, in *Union Life Insurance Co. v. Hanford*,<sup>2</sup> the court holds that in an action brought in the Federal court sitting in Illinois, an extension of time given by a mortgagee to his mortgagor's grantee who has assumed the mortgage, discharges the mortgagor, because such assumption of the mortgage places the grantee in the position of principal and the mortgagee in the position of surety with regard to the mortgage debt. This case proceeds on the theory that the law of Illinois is to govern the substantive rights of the parties in the Federal Court sitting in that State. It seems impossible to reconcile this case with *Willard v. Wood*.

<sup>1</sup> 135 U. S. 309; 10 S. Ct. 831.

<sup>2</sup> 143 U. S. 187; 12 S. Ct. 437. The law of Illinois on this point seems to have been misunderstood. See *Fish v. Glover*, 154 Ill. 86; 39 N. E. 1081.

## CHAPTER VIII.

## RESCISSION OF CONTRACT.

## § 1. Introductory.

A contract may exist and yet be subject to some condition subsequent which entitles one of the parties to the contract to rescind the contract. Such a contract is called voidable. The term rescission is loosely used. Strictly speaking, rescission of a contract signifies the restoration of the parties to the position which they occupied before the contract was made. A contract can be rescinded only by reason of some fact existing at the time of its formation. Thus if A. sells B. a cow with the privilege of returning the cow if she is not a Jersey, and the cow is not a Jersey, B. may rescind his contract to pay for the cow by returning her to A. If, however, A. sells the cow to B. with the privilege of returning her if she does not give ten quarts of milk a day, B. may discharge himself from his obligation to pay for the cow by returning her to A. if she does not give the specified amount of milk. The term rescission is often applied to both these cases, but incorrectly. In the first case the contract is rescinded; in the second, it is discharged. In the first case a condition subsequent attaches to B.'s promise, in the second case only to the obligation of B.'s promise.

We have already examined conditions subsequent which are attached to the contract by the parties themselves, and which we have termed internal conditions.

## 230 ELEMENTS OF THE LAW OF CONTRACTS.

We now come to conditions subsequent which the law attaches to the contract without regard to the intention of the parties, which may be called external conditions subsequent. In other words, we have to consider, first, what facts, not treated by the parties themselves as conditions, will entitle one of the parties to rescind his contract; secondly, how such rescission may be effected; and thirdly, how the right to rescind may be lost.

### § 2. Causes for Rescission.

All external conditions subsequent affecting the contractual nexus, that is, all causes for rescission recognized by the law without regard to the intention of the parties, have this in common:— they are all facts tending to prevent the party who seeks to rescind from acting with a due regard to his own interest in making the contract. Yet though all such causes for rescission are facts which tend to cause such disregard of his own interests by the party seeking to rescind, it is not always necessary that the particular fact which is set up as the ground for rescinding a particular contract should actually have operated to the injury of such party. If the fact in question is one which in legal contemplation is sufficient to induce a party to enter into a contract which he would not enter into but for the existence of that fact, that contract is voidable in two classes of cases. In the first class the contract is voidable by reason of an arbitrary and positive rule of law; in the second class the contract is voidable because one party knows of the existence of the fact which improperly affects the motives of the other party, and seeks to gain an unfair advantage thereby.

(a) *Facts Prejudicially Affecting Motives in Legal Contemplation.*

The first class of voidable contracts includes most contracts of infants, and in some jurisdictions the contracts of insane persons.

(1) INFANCY.—Persons under twenty-one years of age are called infants at common law. A person becomes of age on the day preceding his twenty-first birthday.<sup>1</sup> Statutes in many States regulate the duration of infancy. In some States women become of age at eighteen; and in some States there are statutory proceedings whereby an infant may acquire the rights of majority.

Some contracts of an infant are said to be void, some voidable, and some binding. An opinion formerly prevailed that contracts which were for an infant's benefit were binding, contracts apparently to his prejudice void, and contracts where the question of benefit or prejudice was uncertain, voidable. It is important here to distinguish between motive and capacity with reference to infants' contracts. If an infant's contract is void it is because he lacks contractual capacity; but if it is voidable, it is because the law regards his youth as an insuperable obstacle to rational action in making a contract, and for the infant's protection permits him to escape the consequences of his acts.

It seems doubtful if any contracts of an infant are void at the present day except by virtue of some statute.<sup>2</sup> It is settled, however, that an infant cannot execute a power of attorney to confess judgment or to execute a deed.<sup>3</sup>

<sup>1</sup> *Herbert v. Turball*, 1 Keble, 589; *Ewell's L. C.* 1; *State v. Clarke*, 3 Harring, 557; *Ewell's L. C.* 2.

<sup>2</sup> *Pollock, Contracts*, 52-59.

<sup>3</sup> *Saunderson v. Marr*, 1 H. Bl. 75; *Ewell's L. C.* 35; *Trueblood v. Trueblood*, 8 Ind. 195; *H. & W.* 218; *Ewell's L. C.* 36; *Lawrence v. McArter*, 10 Ohio, 37.



## 232 ELEMENTS OF THE LAW OF CONTRACTS.

All contracts which the law expressly authorizes an infant to make, and all contracts made by the infant in discharge of a legal obligation, are binding. Thus the contract of a minor with the mother of his bastard child to support the child is valid where the law imposes an obligation on the father to support such child.<sup>1</sup>

As to whether any other contracts of an infant are binding, there is a difference between the English and the American authorities. It is frequently said that an infant's contracts for necessities are binding. It is now generally recognized in this country, however, that while an infant is liable for necessities actually received by him his liability is only quasi-contractual.<sup>2</sup>

Thus it is generally held that an infant is liable only for the actual value of the necessities he has received; and this even in jurisdictions where the other party is allowed, by an anomalous procedure, to sue upon the infant's express contract.<sup>3</sup> The quasi-contractual nature of the infant's liability is clearly recognized in a very recent case in Connecticut.<sup>4</sup>

In England contracts for an infant's benefit are binding.<sup>5</sup> This doctrine seems anomalous. The American doctrine that an infant's contracts are voidable regardless of the question of benefit or injury to the infant, or the fairness of the conduct of the other party, is arbitrary, and has proved so unjust that it has been modified by statute in several States. Such a doctrine, however, is at least simple and easy of application. A more rational

<sup>1</sup> *Stowers v. Hollis*, 83 Ky. 544.

<sup>2</sup> Keener, *Quasi-Contracts*, 20.

<sup>3</sup> *Trainer v. Trumbull*, 141 Mass. 527; 6 N. E. 761; H. & W. 220.

<sup>4</sup> *Gregory v. Lee*, 64 Conn. 407; 30 A. 53.

<sup>5</sup> *Fellows v. Wood*, 59 L. T. (N. S.) 513; *Evans v. Ware* (1892), 3 Ch. 502; *Clements v. London & N. W. Ry. Co.* (1894), 2 Q. B. 482. But see *De Francesco v. Barnum*, 43 C. D. 165, 174.

rule would be to place contracts between infants and adults on the same basis as those between a trustee and his *cestui que trust*, and simply require the adult to show that the contract is fair to the infant. The question of fairness is a question of fact, which can be tried in every case. But the question whether a contract is or is not for an infant's benefit is a question of law to be determined by the court from an inspection of the contract; and yet benefit is in reality a question of fact, which is not to be determined by the application of legal principles. The practical justification of the English doctrine is that it accomplishes the desired result of protecting the infant from his improvident contracts without allowing him to avoid all his contracts in the arbitrary manner permitted by the American courts.

The privilege of avoiding a contract on the ground of infancy is an absolute one, and is therefore not affected by the fact that the infant has falsely represented himself to be of full age.<sup>1</sup>

(2) MENTAL INCAPACITY. — In Massachusetts an insane person's contracts, like an infant's, are voidable regardless of the fairness of the other party's conduct, or of such party's ignorance of the former's insanity. "The fairness of the defendant's conduct," says the court, "cannot supply the plaintiff's want of capacity."<sup>2</sup> There is a fallacy here in the use of the word capacity. A lunatic may lack natural capacity to make a contract, but he does not lack legal capacity. A married woman,

<sup>1</sup> *Merriam v. Cunningham*, 11 Cush. 40; *Sims v. Everhardt*, 102 U. S. 300; *Studwell v. Shapter*, 54 N. Y. 249; *Carpenter v. Carpenter*, 45 Ind. 142; *Wieland v. Kobick*, 110 Ill. 16; *Conrad v. Lane*, 26 Minn. 389; *Burdett v. Williams*, 30 F. 697. This rule is changed by statute in some States. And see *contra*, *Pemberton Bldg. & Loan Ass'n v. Adams*, 31 A. 280; — N. J. Eq. —.

<sup>2</sup> *Seaver v. Phelps*, 11 Pick. 304; *Ewell's L. C.* 610.

on the other hand, has natural capacity to make a contract, but at common law lacks legal capacity. Consequently a married woman's contracts are void, while a lunatic's contracts are only voidable. The effect of the Massachusetts doctrine is to place lunatics' contracts on the same basis as those of infants, and to make both infants' and lunatics' contracts voidable absolutely by virtue of an arbitrary rule of law. The Massachusetts doctrine seems unsound in principle, and is opposed to the weight of authority. By the better rule the voidable contracts of insane persons belong, not in the first class of voidable contracts, but in the second.

*(b) Facts Prejudicially Affecting Motives to the Knowledge of the Other Party.*

In this second class of voidable contracts the contract is voidable because of the existence of some fact tending improperly to influence the motives of one party, of which fact the other party has knowledge, and seeks to take advantage. Under this head come contracts voidable on account of mental incapacity, misunderstanding (including mistake and fraud), duress, and undue influence.

(1) MENTAL INCAPACITY. — The difference between mental and legal incapacity has already been pointed out. Mental incapacity has various forms, of which the extreme is insanity. There are cases holding that the contract of a lunatic is void,<sup>1</sup> but the weight of modern authority is overwhelmingly in favor of the proposition that such contracts are at most only voidable.<sup>2</sup> A power

<sup>1</sup> *Burke v. Allen*, 29 N. H. 106; *Ewell's L. C.* 576.

<sup>2</sup> *Carrier v. Sears*, 4 Allen, 336; *Ewell's L. C.* 574; *Matthews v. Baxter*, L. R. 8 Ex. 132; *Louisville, N. A. & C. Ry. Co. v. Herr*, 135 Ind. 591; 35 N. E. 556; *Ashmead v. Reynolds*, 127 Ind. 441; 26 N. E. 441.

of attorney given by an insane person, however, is held to be absolutely void.<sup>1</sup>

Logically, and on the most recent English authority, a lunatic's contract is voidable only when the other contracting party knows of the insanity.<sup>2</sup> An insane person's contracts, therefore, properly belong in the second class of voidable contracts. As we have already seen, however, in Massachusetts such contracts are voidable absolutely without regard to the state of mind of the sane contracting party.<sup>3</sup> In many American courts an anomalous doctrine prevails. This doctrine is that if the sane party is ignorant of the other's insanity, and the contract is fair and cannot be rescinded so as to place the parties *in statu quo*, it is binding.<sup>4</sup> This doctrine rests on some loose statements in an English case<sup>5</sup> decided half a century ago. The present English doctrine is perfectly clear and logical; so is the Massachusetts doctrine, although the latter seems arbitrary; but the attempt to make the validity of a contract depend upon its performance does not and cannot lead to satisfactory or intelligible results. Reasonable ground to know of the insanity is equivalent to actual knowledge.<sup>6</sup>

A lunatic's contracts for necessities are said to be binding;<sup>7</sup> but if the party furnishing the necessities is

<sup>1</sup> *Dexter v. Hall*, 15 Wall. 9; Ewell's L. C. 570.

<sup>2</sup> *Imperial Loan Co. v. Stone* (1892), 1 Q. B. 599 (C. A.); *Leake, Contracts*, 501; *Lancaster County Bank v. Moore*, 78 Pa. St. 407; *Pattee's Cases on Contracts*, 109.

<sup>3</sup> *Seaver v. Phelps*, 11 Pick. 304; Ewell's L. C. 610.

<sup>4</sup> *Young v. Stevens*, 48 N. H. 133; *Riggs v. Amer. Tract Society*, 84 N. Y. 330; *Matthiessen Co. v. McMahon*, 38 N. J. L. 536; *Alexander v. Haskins*, 68 Ia. 73; 25 N. W. 935; *Northwestern Ins. Co. v. Blankenship*, 94 Ind. 535.

<sup>5</sup> *Molton v. Camroux*, 2 Ex. 487; 4 Ex. 17; Ewell's L. C. 614.

<sup>6</sup> *Lincoln v. Buckmaster*, 32 Vt. 652.

<sup>7</sup> *Bagster v. Earl of Portsmouth*, 5 B. & C. 170; Ewell's L. C. 632.

aware of the insanity, the insane person's liability is really quasi-contractual in its nature.<sup>1</sup> In some cases the lunatic has been held liable not only for necessities, but also for other things reasonable and proper for the lunatic's comfort.<sup>2</sup>

The contracts of an insane person are voidable because his lack of mental capacity prevents his forming a rational estimate of the legal consequences of his acts, and because the other party, knowing of the insanity, has no right to attempt to bind the insane person by contract. Mere weakness of mind falling short of insanity is not sufficient to invalidate the contract.<sup>3</sup> Nor does the fact that a party is a monomaniac entitle him to rescind his contract,<sup>4</sup> unless the monomania affects his understanding in regard to a particular contract. If, however, the monomania affects the contract in question, the contract is voidable. Thus where a man of seventy-two was a monomaniac on the subject of spiritualism an ante-nuptial agreement to deliver property to a female medium was held voidable.<sup>5</sup>

If a man does not understand what he is doing when he makes a contract it is of no consequence whether his lack of understanding is due to idiocy or insanity, or whether it is brought about by drunkenness,<sup>6</sup> or by the

<sup>1</sup> *Sceva v. True*, 53 N. H. 627; *Sawyer v. Lufkin*, 56 Me. 308; *Re Rhodes*, 44 C. D. 94, 105; *Keener*, *Quasi-Contracts*, 20.

<sup>2</sup> *Kendall v. May*, 10 Allen, 59.

<sup>3</sup> *Stone v. Wilbern*, 83 Ill. 105; *Pattee's Cases on Contracts*, 144; *Kimball v. Cuddy*, 117 Ill. 213; 7 N. E. 589; *Miller v. Craig*, 36 Ill. 109; *Dennett v. Dennett*, 44 N. H. 531; *Ewell's L. C.* 547; *Miller v. Rutledge*, 82 Va. 863; 1 S. E. 201.

<sup>4</sup> *Boyce v. Smith*, 9 Gratt. 704.

<sup>5</sup> *Connor v. Stanley*, 72 Cal. 556; 14 P. 306.

<sup>6</sup> *Gore v. Gibson*, 13 M. & W. 623; *Ewell's L. C.* 734; *Barrett v. Buxton*, 2 Aikens, 167; *Ewell's L. C.* 728; *H. & W.* 228; *Bush v. Breinig*, 113 Pa. St. 310; 6 A. 86.

use of opiates;<sup>1</sup> and conversely, if he does know what he is doing, his intoxication is no defence to an action on the contract.<sup>2</sup> It has been held, however, that if the party's mind is "in an abnormal state superinduced by drunkenness," he may avoid a contract made by him when in such state.<sup>3</sup> Whatever the cause of the mental derangement, such derangement must, of course, exist at the time the contract is made, in order to render the contract voidable.<sup>4</sup>

A judicial declaration of a person's insanity deprives him of legal contractual capacity, and all contracts made thereafter are not voidable, but void.<sup>5</sup> A judgment of insanity, however, has no retroactive effect.<sup>6</sup>

(2) MISUNDERSTANDING. — There is often in contracts some misunderstanding on the part of one or both parties. This misunderstanding may be in regard to the promise or promises actually made, or it may be with reference to the subject-matter of the contract; it may or may not be common to both parties; and the misunderstanding of one party may or may not be induced by the conduct of the other.

*(a) Common to Both Parties.*

And first, with regard to cases where the misunderstanding in question is common to both parties. This misunderstanding may be with reference to the terms of the contract or to the subject-matter of the contract.

<sup>1</sup> Chicago, &c. Ry. Co. v. Lewis, 109 Ill. 120.

<sup>2</sup> Bates v. Ball, 72 Ill. 108; Watson v. Doyle, 130 Ill. 415; 22 N. E. 613.

<sup>3</sup> Franks v. Jones, 39 Kans. 236; 17 P. 663.

<sup>4</sup> Conley v. Nailor, 118 U. S. 127; 6 S. Ct. 1001; Watson v. Doyle, *supra*; Lilly v. Waggoner, 27 Ill. 395.

<sup>5</sup> Wadsworth v. Sharpsteen, 8 N. Y. 388.

<sup>6</sup> Knox v. Knox, 30 S. C. 377; 9 S. E. 353.

(1) **AS TO THE TERMS OF THE CONTRACT.** — If there is a mutual mistake in regard to the terms of the contract it is because the parties have intended to bring about a certain change in their legal relations by means of the contract, and have failed to express themselves so as to produce that change, either on account of a mistake in the use of language, or on account of a mistake as to the legal effect of the language used. We have already seen that when the parties have once agreed that a written document shall be regarded as expressing the terms of their contract, oral evidence is inadmissible to vary the terms of such written contract. If this rule were an absolute one it would clearly work great injustice; and to prevent such injustice a court of equity will, under proper circumstances, interfere to reform the writing in question to conform to the intention of the parties. This reformation may be looked upon as a rescission of the contract actually made, and a substitution therefor of the contract which the parties intended to make. The subject of reformation of instruments therefore may properly be treated in connection with the rescission of contracts.

The fundamental rule of equity with reference to the reformation of written instruments may be stated as follows. Where the parties to a given transaction have intended to bring about a certain change in their legal relations by means of a written instrument, and that instrument fails to produce the intended legal result, a court of equity will reform the instrument in question so as to make it conform to the intention of the parties.

It is apparent from the foregoing rule that a mistake as to the nature of the promise will not be ground for the reformation of the instrument unless such mistake is common to both parties.<sup>1</sup> "It must appear that both

<sup>1</sup> *Fowler v. Fowler*, 4 De G. & J. 250.

have done what neither intended;"<sup>1</sup> and it must also appear that both intended to do the same thing. Hence there may be a mistake on each side, and yet such double mistake will not be ground for reforming an instrument. Thus in *Page v. Higgins*,<sup>2</sup> A. executed a deed to B. under an agreement to sell all his land in a certain town. B. supposed that A. owned two tracts, X. and Y., and drew the deed so as to include both. A. owned only X., and supposed that the deed conveyed only X. The court refused to reform the deed because, though each party had made a mistake, the mistake on one side was different from that on the other.

Mistake on one side, however, is recognized as ground for reforming an instrument where such mistake is caused by the fraud of the other party.<sup>3</sup> This doctrine seems unsound in principle. In so far as a party is injured by fraud his rights are to be restored to the position which he would have occupied had not the fraud been committed. Now if a written contract is executed by A. and B., and B. executes the contract because A.'s fraud has misled B. as to its terms, the effect of the fraud has been to induce B. to execute a contract which he would not otherwise have executed, and B. is therefore entitled to a rescission of such contract. A., however, has executed the exact contract which he intended to execute, and to reform the contract is for the court to impose an obligation upon him which is not really contractual, since it is not the obligation created by his act in executing the written contract. By virtue of this doctrine B. has the right to enforce the contract as executed, or to enforce an obligation

<sup>1</sup> *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 491.

<sup>2</sup> 150 Mass. 27; 22 N. E. 63.

<sup>3</sup> *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 435; 12 S. Ct. 239; *Bergen v. Ebey*, 88 Ill. 269.



which A. never incurred by virtue of any contract, but simply through the decree of the court "reforming" the contract in question.

Some courts carry this doctrine even farther, and decree a reformation of the contract whenever one party has made a mistake with regard to its terms of which the other party was cognizant.<sup>1</sup> This case differs from fraud in that the mistake is not caused by the conduct of the other party. The true rule, in such cases, however, is this:—if A. and B. enter into a contract, and A. makes a mistake with reference to its terms, of which B. is aware, a court of equity will rescind the contract at A.'s request unless B. consents to its reformation in accordance with A.'s understanding of its terms.<sup>2</sup>

It is often said that equity will correct a mistake of fact, but not a mistake of law; that if the parties to a contract say X. when they mean Y., the contract will be reformed, and Y. substituted for X.; but that if the parties make a mistake only as to the legal effect of the word X., the court will not interfere. The true rule, however, is this. When there is an intention on the part of both parties that a certain contract shall be executed, and the written instrument which they execute does not have the effect which they intend, it makes no difference whether the mistake of the parties is in regard to the terms of the contract or as to the legal effect of those terms. In either case the court will correct the instrument by making it conform to the intention of the parties. If, however, in addition to the general intention of executing a certain contract, the

<sup>1</sup> Wyche v. Greene, 26 Ga. 415; Roszell v. Roszell, 109 Ind. 354; 10 N. E. 114; Essex v. Day, 52 Conn. 483.

<sup>2</sup> Paget v. Marshall, 28 C. D. 255; Garrard v. Frankel, 30 Beav. 445; Fehlberg v. Cosine, 16 R. L. 162; 13 A. 110.

parties have the specific intention of executing the particular instrument in question, then the specific intention controls, and the court cannot reform the instrument to make it conform to the general intention of the parties. This specific intention must, it seems, be something more than the intention of doing an act which is inferred from the voluntary doing of that act. The specific intention must be the result of deliberation and choice.<sup>1</sup>

The foregoing principles are illustrated by the following cases.

A. sells a piece of land to B. By mistake the *habendum* in the deed runs "to B. and his bodily heirs," instead of "to B. and his heirs;" thereby conveying an estate-tail instead of a fee-simple. The mistake is a mistake of law as to the effect of the words "bodily heirs," but the deed will be reformed.<sup>2</sup>

A. B. and C. form a partnership. A. takes out an insurance policy on cotton belonging to the firm. A. communicates the facts in regard to the ownership of the cotton to the insurance agent, who tells him that a policy in A.'s name will protect the interest of the firm. The policy is issued in A.'s name, but by reason of a mistake as to the law does not protect the firm. The policy will be reformed.<sup>3</sup>

A. signs a bond conditioned that B. shall "abide by and perform the orders and decrees" of the court in a certain action. The bond is intended simply as security for B.'s appearance in court so as to be amenable to such "orders and decrees." There is no mistake as to the words of the bond, but there is a mistake as to

<sup>1</sup> See Bigelow's note to Story's Equity Jurisprudence (13th ed.), § 1111.

<sup>2</sup> *Dinwiddie v. Self*, 145 Ill. 290; 33 N. E. 892.

<sup>3</sup> *Snell v. Ins. Co.*, 98 U. S. 85.

the legal effect of the words used. The bond will be reformed.<sup>1</sup>

Some courts still cling to the idea that there is a distinction between mistake of law and mistake of fact. Thus the Supreme Court of Illinois in a recent case states the law of that State as follows: "If the words are written as the parties intended they should be written or supposed they were written, no matter how much they may be mistaken in the meaning of those words, no relief can be granted either at law or in equity."<sup>2</sup> In that case some grantors intended to convey land to A. with remainder to his children, and gave instructions to a conveyancer accordingly. The conveyancer used the word "heirs" instead of "children" in the deed, thereby altering its legal effect. The grantors executed the deed, supposing it would give effect to their intention, and the court refused to reform the deed.

While a mistake of law will not prevent the court from reforming a contract so as to give effect to the intention of the parties, the principle that the specific intention controls the general intention is illustrated by the leading case of *Hunt v. Rousmaniere*.<sup>3</sup> In that case the defendant's intestate had borrowed money of the plaintiff, and had given as security a power of attorney to sell certain vessels. The general intention of the parties was to give the plaintiff a lien on the vessels. The plaintiff was advised by counsel, however, that a power of attorney would be preferable to a mortgage, and such power of attorney was accordingly given. The borrower died insolvent, and the plaintiff sought to enforce his supposed lien on the vessels. The power of

<sup>1</sup> *Griswold v. Hayward*, 141 U. S. 260; 11 S. Ct. 972, 999.

<sup>2</sup> *Fowler v. Black*, 136 Ill 363; 26 N. E. 596; *contra*, *Brock v. O'Dell*, 21 S. E. 976 (S. C.), which supports the principles stated in the text.

<sup>3</sup> 1 Pet. 1.

attorney, however, was revoked by the debtor's death, and the court refused to treat it as a mortgage. The general intention of the parties that a lien on the vessels should be given was controlled by their specific intention that the power of attorney should be executed instead of a mortgage; and as their specific intention had been carried out, there was no ground on which the court could interfere.

(2) AS TO THE SUBJECT-MATTER. — When there is a common mistake as to the subject-matter, such mistake has, in itself, no legal effect. There are various cases in which such mistake seems to have legal consequences, but those consequences are in reality due to other causes.

A common case of mistake occurs when two inconsistent descriptions are applied to the subject-matter of the contract; as where there is a contract for the sale of "this bar of gold," and "this bar" is not "of gold." The rights of the parties in such case are not in any way affected by reason of the mistake in itself, but are determined by the rules heretofore given under the head of Conditions. If the two inconsistent descriptions are both essential, and there is no warranty that both descriptions are correct, the contract is void. This is not because there is a mutual mistake, but because there is nothing in existence corresponding to the terms used in the contract, so that the contract is meaningless. If, however, one of the parties warrants that both descriptions are correct, the contract is not void, but voidable at the option of the other party. This is because the correctness of both descriptions is a condition subsequent affecting the promise of the latter party, while the promise of the party warranting such correctness is absolute. Finally, if the two descriptions, though inconsistent, are not both essential, a mistake as to the

non-essential description does not affect the validity of the contract.

That a common mistake as to the subject-matter does not affect the validity of the contract unless there is some condition, express or implied, in the contract itself, is clear. Thus where A. sold to B. for \$1 a stone of the nature of which both parties were ignorant, and the stone subsequently proved to be a diamond, the contract was held binding.<sup>1</sup> So where A. sold a note to B., and the makers of the note were insolvent, the fact that the parties both supposed the makers solvent was held immaterial.<sup>2</sup>

Mistake as to the existence of the subject-matter is really a special case of inconsistent descriptions, and the same rules apply as in the case of such inconsistent descriptions.<sup>3</sup>

Mistake as to the identity of the subject-matter is said to render the contract void. Where there is a mistake as to the identity of the subject-matter the contract is usually void. In the case of simple contracts, however, the contract is void because there is no consideration for the promise, as has already been shown. In the case of formal contracts it is not clear that the mistake as to identity of the subject-matter can have any effect unless some condition can be imported into the contract itself. If A. covenants to give Blackacre to B., and there are two estates called Blackacre, the fact that A. means one of those estates, and B. thinks A. means another can hardly be regarded as rendering A.'s covenant void. If, however, A. and B. execute a charter-party of the ship "Peerless," and there are two

<sup>1</sup> *Wood v. Boynton*, 64 Wis. 265; 25 N. W. 42; H. & W. 257.

<sup>2</sup> *Hecht v. Batcheller*, 147 Mass. 335; 17 N. E. 651; H. & W. 255.

<sup>3</sup> *Gibson v. Pelkie*, 37 Mich. 380; H. & W. 247; *Contourier v. Hastie*, 5 H. L. C. 673; *Strickland v. Turner*, 7 Ex. 208.

ships named "Peerless," it seems proper to regard A. as chartering ship No. 1 to B. on condition that B. agrees to take that ship, and B. as agreeing to take ship No. 2 on condition that A. charters that ship; so that such a charter-party is void.

Mistake as to the identity of the promisee is said to render the contract void. This rule rests in reality on two simple principles. The first is that if A. makes a promise to B., C. cannot enforce that promise by palming himself off as B. The second is that if A. accepts a benefit from B., not knowing or having reason to know that B. expects to be paid for it, A.'s acceptance of the benefit does not constitute a promise to pay B. for it.<sup>1</sup>

*(b) Of One Party Only.*

(1) NOT KNOWN TO THE OTHER.—It has been stated that voidable contracts of the second class are rendered voidable by reason of the existence of some fact which tends to prevent one of the parties from acting with a due regard to his own interest, of the existence of which the other party is aware and seeks to take advantage. Any misunderstanding or mistake, therefore, of one party, of which the other party does not know or has not good reason to know does not affect the validity of the contract.<sup>2</sup> Thus where the general agent of a railroad company quotes a certain freight rate to a local agent, and the local agent by mistake quotes a lower rate to the shipper, the railroad company is bound if the shipper does not know of the mistake.<sup>3</sup>

In the application of the foregoing rule it must always be remembered that there are two questions to be

<sup>1</sup> See *ante*, p. 44.

<sup>2</sup> *Comer v. Grannis*, 75 Ga. 277; *Griffin v. O'Neil*, 48 Kans. 117; 29 P. 143; *Scott v. Littledale*, 8 E. & B. 815.

<sup>3</sup> *Borden v. Richmond, &c. R. R. Co.*, 113 N. C. 570; 18 S. E. 392.

answered: first, is there a contract? and second, is the contract voidable? A mistake of one party of which the other party is ignorant may prevent the formation of a contract, as we have already seen;<sup>1</sup> but if a contract is actually made such a mistake does not render it voidable.

(2) KNOWN TO THE OTHER.—A misunderstanding of one party of which the other party is aware has three distinct phases: first, where such misunderstanding is not due to the conduct of the other party; second, where the misunderstanding is caused by the innocent conduct of the other party; and third, where the misunderstanding is caused by the fraudulent conduct of the other party. The first phase is commonly treated under the head of Mistake; the second under the head of Misrepresentation; and the third under the head of Fraud. In all three cases the contract may be voidable, but there are certain important distinctions between Mistake, Misrepresentation, and Fraud, which require examination.

(a) *Not Caused by the Other Party — Mistake.* — And first as to Mistake, that is, misunderstanding of one party not caused by the other. Mistake as to the nature of a promise by one party, if known to the other, renders the contract voidable.<sup>2</sup> Thus where A. leases land to B, and by mistake fixes the rent at £130 instead of £230, and B. knows of the mistake, A. is not bound.<sup>3</sup> So where by a mistake in a rate-sheet a railroad rate is given as \$15 less than it should be, a person who buys a ticket at that rate knowing of the mistake cannot hold the railway company.<sup>4</sup>

<sup>1</sup> *Ante*, p. 35.

<sup>2</sup> *Everson v. International Granite Co.*, 65 Vt. 658; 27 A. 320.

<sup>3</sup> *Garrard v. Frankel*, 30 Beav. 445.

<sup>4</sup> *Shelton v. Ellis*, 70 Ga. 297; H. & W. 262.

The foregoing principle was applied by the United States Supreme Court in *Hume v. United States*.<sup>1</sup> The plaintiff sued for the price of shucks furnished the defendant. The plaintiff had submitted bids for furnishing various articles on blank schedules provided by the government. It was customary to buy shucks by the hundredweight, but in the schedule the printed word "pounds" had not been changed, so that the plaintiff submitted a bid for furnishing shucks at 60 cents a pound, which was accepted. The shucks were worth less than 2 cents a pound. The court held that the plaintiff knew or ought to have known that there was a clerical error in the contract, and that the government agents could not have intended to accept a bid for shucks at thirty times their real value. The contract was therefore held not binding on the government.

The same principle was applied in the leading English case of *Smith v. Hughes*.<sup>2</sup> In that case A. agreed to buy some oats of B. The court held that if A. thought B. was agreeing to sell old oats and B. knew that A. thought so, B. could not compel A. to accept new oats.

(b) *Caused by the Other Party — Misrepresentation and Fraud.* — Where the misunderstanding in question is caused by the conduct of the other party to the contract, such conduct constitutes Misrepresentation. If the misrepresentation is fraudulent, it is called Fraud. A false representation by one party in regard to a material fact made for the purpose of inducing the other party to enter into a contract, and actually inducing the latter to enter into the contract, renders the contract voidable.

A false representation may consist either in an act or in an omission. An omission to communicate facts which one person is bound to communicate to another

<sup>1</sup> 132 U. S. 406; 10 S. Ct. 134.

<sup>2</sup> L. R. 6 Q. B. 597.



amounts to a representation that those facts do not exist. A person cannot, of course, be bound to communicate knowledge which he does not possess.

There is no general duty resting on any one to disclose to another all material facts with reference to a contract between the parties. Parties dealing with each other at arm's length, like vendor and vendee, are not in general bound to disclose facts affecting the value of the subject-matter of the contract.<sup>1</sup> Even if the vendor is aware that the purchaser thinks that the thing sold possesses a certain quality, and would not enter into the contract if he knew the truth, the vendor's failure to correct the purchaser's mistake does not render the contract voidable.<sup>2</sup> The common law maxim is *caveat emptor*; but there are American cases which treat the vendor as under obligation to disclose latent defects in the thing sold.<sup>3</sup>

The existence of a fiduciary relation between the parties to a contract imposes on the fiduciary the duty of acting with the utmost fairness; and if he fails to disclose all facts within his knowledge affecting the transaction the contract is voidable.<sup>4</sup>

There are certain contracts in which the promise of one party is conditional upon the disclosure of all material facts by the other party. Such contracts are termed *uberrimæ fidei*. In contracts of marine insurance the policy is conditional upon the disclosure of all material

<sup>1</sup> Laidlaw v. Organ, 2 Wheat. 178; H. & W. 282; Bigelow, Fraud, i. 591; Benjamin, Sales, § 430.

<sup>2</sup> Smith v. Hughes, L. R. 6 Q. B. 597; Law v. Grant, 37 Wis. 548; Williams v. Spurr, 24 Mich. 335; contra, Cecil v. Spurger, 32 Mo. 462; Lunn v. Shermer, 93 N. C. 164.

<sup>3</sup> Grigsby v. Stapleton, 94 Mo. 423; 7 S. W. 421; H. & W. 285; Benjamin, Sales (Bennett's 6th ed.), 451.

<sup>4</sup> Bigelow, Fraud, i. 315.

facts by the insured. Non-disclosure in such a case prevents the formation of a contract. And in any contract of insurance the policy insures only the risk therein described; hence if the risk is not properly described there is no contract. There may, however, be a contract of insurance in which the risk is described with essential accuracy, and yet there may be a failure to disclose all material facts. In such a case it seems that there is a contract which is voidable on the ground of misrepresentation.<sup>1</sup>

A contract of suretyship is not *uberrimæ fidei*. It is not necessary, therefore, that the creditor should disclose all facts in regard to the transaction. The silence of the creditor must amount to a positive misrepresentation in order to render the contract voidable.<sup>2</sup>

Although silence does not ordinarily amount to a representation, a partial disclosure of the truth may give a false impression because the whole truth is not told. In such a case the concealment of part of the truth coupled with a confession of the rest may amount to a misrepresentation. Thus where A. promised to marry B., and B. told A. she had obtained a divorce from a former husband, the concealment by B. of the fact that her former husband had also obtained a divorce from her was held to amount to a positive misrepresentation.<sup>3</sup> And in contracts of suretyship it is held in England that the creditor impliedly represents to the surety that he knows of nothing in the transaction that would be regarded as unnatural with reference to the transaction in question.<sup>4</sup>

<sup>1</sup> Bigelow, *Fraud*, i. 623.

<sup>2</sup> *Ibid.*, i. 601; Pollock, *Contracts*, 493; Leake, *Contracts*, 347; Anson, *Contracts* (8th ed.), 161.

<sup>3</sup> *Van Houten v. Morse*, 162 *Mass.* 414; 38 *N. E.* 705.

<sup>4</sup> Bigelow, *Fraud*, i. 601.

The representation must, in general, be a representation of fact. An expression of opinion is not a representation of fact, nor is a prediction of a future event.<sup>1</sup> A positive expression of opinion, however, in regard to facts susceptible of knowledge, or the positive prediction of a future event, may amount to a representation that the party expressing the opinion or making the prediction is acting in good faith, and knows nothing contrary to what he has said.<sup>2</sup> So a statement of opinion in regard to facts peculiarly within the knowledge of the party making the statement may amount to a representation that the party making the statement knows facts which justify his opinion.<sup>3</sup>

A representation of intention ordinarily either gives rise to a contract or has no effect.<sup>4</sup> Nevertheless, intention is a matter of fact, and if a man represents that he has a certain intention when he has not, he clearly makes a false representation of fact.<sup>5</sup> Thus it is generally held that the purchase of goods amounts to a representation that the buyer intends to pay for them, and if he intends not to pay for them he is guilty of fraud.<sup>6</sup> In some cases a representation of intention has been held not to amount to fraud under any circumstances;<sup>7</sup> while some decisions draw a distinction between an intention not to pay for goods and an intention not to perform some other promise, hold-

<sup>1</sup> Bigelow, *Fraud*, i. 473; *Southern Development Co. v. Silva*, 125 U. S. 247; 8 S. Ct. 881; *Sheldon v. Davidson*, 85 Wis. 138; 55 N. W. 161; *H. & W.* 295; *Dawe v. Morris*, 149 Mass. 188; 21 N. E. 313; *H. & W.* 292.

<sup>2</sup> Bigelow, *Fraud*, i. 474, 475.

<sup>3</sup> *French v. Ryan*, 62 N. W. 1016; — Minn. —.

<sup>4</sup> *Dawe v. Morris*, *supra*; *Long v. Woodman*, 58 Me. 49; Bigelow, *Fraud*, i. 483.

<sup>5</sup> *Ibid.*, i. 484.

<sup>7</sup> *Smith v. Smith*, 21 Pa. St. 367.

<sup>6</sup> *Ibid.*, i. 486; *Donaldson v. Farwell*, 93 U. S. 631.

ing that the former constitutes fraud,<sup>1</sup> but not the latter.<sup>2</sup>

A representation of law does not ordinarily affect the validity of a contract.<sup>3</sup> "A representation of law," says Sir George Jessel, "is this, — when you state the facts and state a conclusion of law so as to distinguish between facts and law."<sup>4</sup> A statement of fact which involves a conclusion of law is nevertheless a statement of fact. And even a misrepresentation of the law will stand on the same ground if the party to whom it is made is justified in relying upon it. In New York the following rule has been laid down. "Where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair, and deceptive conduct which tends to confirm the mistake and conceal the truth, it is the duty of equity to give relief."<sup>5</sup> This rule, however, seems somewhat broadly stated. Ordinarily, one man is not justified in relying upon another's representations in regard to the law; but if the party making the representation of law occupies a fiduciary position toward the other,<sup>6</sup> or if from his superior means of information the other party is reasonably entitled to accept his statements in regard to the law,<sup>7</sup> a statement of law has the same effect as a statement of fact. Indeed, in all cases of misrepresentation, the fundamental question is as to the right of the party to whom the

<sup>1</sup> *Allen v. Hartfield*, 76 Ill. 358; *Farwell v. Hanchett*, 120 Ill. 573; 11 N. E. 875.

<sup>2</sup> *Gage v. Lewis*, 68 Ill. 604.

<sup>3</sup> *Upton v. Tribilcock*, 91 U. S. 45; *Fish v. Cleland*, 33 Ill. 237; H. & W. 288.

<sup>4</sup> In *Eaglesfield v. Londonderry*, 4 C. D. 693.

<sup>5</sup> *Haviland v. Willets*, 141 N. Y. 35, 50; 35 N. E. 958.

<sup>6</sup> *Sims v. Ferrill*, 45 Ga. 585.

<sup>7</sup> *Ross v. Drinkard*, 35 Ala. 434; H. & W. 291; *Bigelow. Fraud*, i. 489; *Titus v. Rochester German Ins. Co.*, 31 S. W. 127; — Ky. —.

representation is made to act upon it.<sup>1</sup> The character of the representation is an important thing to be considered in determining whether or not action upon the representation is justified, but all the other circumstances of the case are also to be taken into consideration.

Even a false representation of fact is not sufficient to justify the other party in acting upon it if it comes under the head of what are termed "seller's statements," or *simplex commendatio*.<sup>2</sup> Under this head come statements by the vendor of property in regard to its value.<sup>3</sup> Representations in regard to the productiveness of land have been placed on the same footing.<sup>4</sup> In some States representations by the vendor as to the cost of an article or as to offers made for it are also treated as seller's statements.<sup>5</sup> All such representations, however, may be made under circumstances entitling the buyer to rely upon them, as where a fiduciary relation exists between the parties, or where one party has or assumes to have special knowledge of the value of the property upon which he knows the other relies.<sup>6</sup>

The party to whom the representation is made must be induced thereby to enter into the contract. That is, he must be ignorant of the truth, must believe the representation, and must enter into the contract as a result

<sup>1</sup> Griel v. Lomax, 94 Ala. 641; 10 S. 232.

<sup>2</sup> Lehigh Zinc Co. v. Bamford, 150 U. S. 665; Southern Development Co. v. Silva, 125 U. S. 247; 8 S. Ct. 881; Gordon v. Butler, 105 U. S. 553; Bigelow, Fraud, i. 490.

<sup>3</sup> *Ibid.*, i. 491; Conly v. Coffin, 115 N. C. 563; 20 S. E. 207.

<sup>4</sup> Gordon v. Parmelee, 2 Allen, 212.

<sup>5</sup> Bigelow, Fraud, i. 492; Medbury v. Watson, 6 Met. 246; Long v. Woodman, 58 Me. 52; *contra*, Page v. Parker, 43 N. H. 363; Jackson v. Armstrong, 50 Mich. 65; 14 N. W. 702.

<sup>6</sup> Bigelow, Fraud, i. 496; Chrysler v. Canaday, 90 N. Y. 272; Stover v. Wood, 26 N. J. Eq. 417.

of that belief.<sup>1</sup> A man who acts upon the strength of his own information,<sup>2</sup> or upon a representation by a third party,<sup>3</sup> cannot avoid his contract on the ground of misrepresentation, because the misrepresentation has not been the cause of his entering into the contract. But it is not necessary that the false representation should have been the sole inducement to the contract; it is sufficient if it was a material inducement, though there may have been other material inducements.<sup>4</sup>

The party acting on the misrepresentation must have been justified in so acting. The representation must therefore be made either to him personally, or to a third person to be communicated to him. Thus a report of the state of the affairs of a corporation filed with a public officer as required by law is not a representation on which any one is justified in acting.<sup>5</sup>

The representation must be acted on within a reasonable time after it is made.<sup>6</sup>

According to some courts a person must use reasonable diligence to discover for himself facts obvious to an ordinary observer, of which the means of knowledge are equally available to both parties, and if he fails to do this he cannot set up that he has been misled by the other party.<sup>7</sup> In the application of this rule, says the Supreme Court of Massachusetts, "the circumstances of

<sup>1</sup> Bigelow, *Fraud*, i. 521; *Ming v. Woolfolk*, 116 U. S. 599; 6 S. Ct. 489.

<sup>2</sup> *Dickinson v. Lee*, 106 Mass. 557.

<sup>3</sup> *Wachsmuth v. Martini*, 154 Ill. 515; 39 N. E. 129.

<sup>4</sup> *Ruff v. Jarrett*, 94 Ill. 475; *Sioux Nat. Bank v. Norfolk State Bank*, 56 F. 139; 5 C. C. A. 448; 12 U. S. App. 347.

<sup>5</sup> *Hunnewell v. Duxbury*, 154 Mass. 286; 28 N. E. 267; H. & W. 303.

<sup>6</sup> *Sharpless v. Gummey*, 166 Pa. St. 199; 30 A. 1127.

<sup>7</sup> *Slaughter v. Gerson*, 13 Wall. 379; *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212; 39 P. 366; *Brady v. Finn*, 162 Mass. 260; 58 N. E. 506; *Holst v. Stewart*, 161 Mass. 516; 37 N. E. 755.

each case should be considered to determine whether the plaintiff has been guilty of such inexcusable negligence as should preclude him, under a general rule of public policy, from having a remedy against one who has fraudulently abused his confidence."<sup>1</sup> What rule of public policy requires the courts to uphold a fraud is not clear. The more rational rule is that a man who has deceived another has no right to say "you ought not to have trusted me" in any case, if the other party has actually relied on his representations.<sup>2</sup> The negligence of one party doubtless aids the other in perpetrating a fraud, but there is no good reason why the shrewd rascal should therefore be allowed to take advantage of the careless innocent.

It has already been stated that misrepresentation may be innocent or fraudulent. In either case the contract is voidable, but the methods of obtaining rescission are different. The differences in regard to the manner of rescission will be explained later; but it is here necessary to point out the difference between innocent and fraudulent misrepresentation, or to use other terms, between misrepresentation and fraud.

If a misrepresentation is made with knowledge of its falsity it is always fraudulent. A misrepresentation made without belief in its truth is fraudulent. And a misrepresentation made recklessly without caring whether it be true or false is fraudulent.<sup>3</sup> So far the authorities are in harmony. On the question whether a false statement made with an honest belief in its truth but without reasonable grounds for such belief is fraudu-

<sup>1</sup> *Holst v. Stewart*, *supra*.

<sup>2</sup> *Bigelow, Fraud*, i. 524-528; *Speed v. Hollingsworth*, 54 *Kans.* 436; 38 *P.* 496; *Wilson v. Carpenter*, 21 *S. E.* 243; — *Va.* —; *Redgrave v. Hurd*, 20 *C. D.* 1.

<sup>3</sup> *Lord Herschell*, in *Derry v. Peek*, 14 *A. C.* 337.

lent there is a difference of opinion. It is held by the House of Lords that want of reasonable ground to believe that a statement is true does not make such statement fraudulent;<sup>1</sup> and this is the doctrine of some American courts.<sup>2</sup> On the other hand, other courts hold that a positive statement of a fact within one's means of knowledge implies that one has knowledge of the truth of his statement; and that such a statement is therefore fraudulent.<sup>3</sup> The doctrine of the United States Supreme Court is not clear. That court has held erroneous an instruction that lack of reasonable ground for belief in a statement constitutes fraud;<sup>4</sup> but it has also said "that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity."<sup>5</sup>

(3) DURESS. — A person who is induced by duress to enter into a contract may avoid the contract on the ground of such duress. The duress operates as a condition subsequent affecting the validity of the contract. The contract is voidable, not void,<sup>6</sup> because the act of

<sup>1</sup> *Derry v. Peek*, *supra*.

<sup>2</sup> *McKown v. Furgason*, 47 Ia. 636; *H. & W.* 301; *Lamberton v. Dunham*, 165 Pa. St. 129; 30 A. 716.

<sup>3</sup> *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 18 N. E. 168 *H. & W.* 298; *Cole v. Cassidy*, 138 Mass. 437; *Glaspie v. Keator*, 12 U. S. App. 281; 56 F. 203; 5 C. C. A. 474; *Cabot v. Christie*, 42 Vt. 121.

<sup>4</sup> *Lord v. Goddard*, 13 How. 198.

<sup>5</sup> *Lehigh Zinc Co. v. Bamford*, 150 U. S. 665.

<sup>6</sup> *Miller v. Minor Lumber Co.*, 98 Mich. 163; 57 N. W. 101; *Ormes v. Beadel*, 2 De G. F. & J. 333; *Lewis v. Bannister*, 16 Gray, 500; *Sorn-*



the party in executing the contract is a voluntary act in the legal sense. His will acts, although the duress constitutes the motive for his action.

The older cases limited duress to cases involving great bodily harm or imprisonment, or threats of such violence or imprisonment.<sup>1</sup> The tendency of the modern cases, however, is to enlarge the definition of duress, so as to make it include all cases of unlawful interference with the person or property of another for the purpose of compelling him to make a contract. According to the modern view, duress consists in the actual or threatened unlawful exercise of power possessed, or believed to be possessed by one party, over the person or property of another, from which the latter has no other means of immediate relief than by performing the required act.<sup>2</sup> It must be shown that the party charged with duress used such means to induce the other to act as would overcome the mind and will of an ordinary person.<sup>3</sup>

Refusal to perform a contract does not constitute duress, though such refusal is made for the purpose of compelling the performance of an act by the other party.<sup>4</sup> Threats of a civil action do not constitute

*borger v. Sanford*, 34 Neb. 498; 52 N. W. 368; *Eberstein v. Willets*, 134 Ill. 101; 24 N. E. 967; *Oregon Pac. R. Co. v. Forrest*, 128 N. Y. 83; 28 N. E. 137.

<sup>1</sup> Bacon's Abridgment, "Duress," A; Comyn's Digest, "Pleader" (2 W. 20); 2 Inst. 483.

<sup>2</sup> *Radich v. Hutchins*, 95 U. S. 210, 213; *Loneragan v. Buford*, 148 U. S. 531; 13 S. Ct. 684; *Stanton v. Jerome*, 54 N. Y. 480; *Oliphant v. Markham*, 79 Tex. 543. The old rule seems to prevail in England. *Leake, Contracts*, 351.

<sup>3</sup> *Morse v. Woodworth*, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; *H. & W.* 308.

<sup>4</sup> *Doyle v. Trinity Church*, 133 N. Y. 372; 31 N. E. 221; *Hackley v. Headley*, 45 Mich. 569; *Mason v. United States*, 17 Wall. 67; *Silliman v. United States*, 101 U. S. 465; *Secor v. Clark*, 117 N. Y. 350; 22 N. E. 754; *contra, Adams v. Schiffer*, 11 Col. 15; 17 P. 21.

duress.<sup>1</sup> Nor threats to take possession of property by means of a judicial writ, unless there is an attempt to abuse the process of the court.<sup>2</sup> Detention of goods under a claim of right is not duress.<sup>3</sup> An attachment of a third person's goods on a writ against the debtor does not constitute duress where no unlawful threats are used.<sup>4</sup> It has been held in Oregon that threats constitute duress in any case where they operate to overcome the will of the person to whom they are addressed;<sup>5</sup> but this rule should be limited to cases where the threats would be sufficient to overcome the will of an ordinary man.<sup>6</sup>

Threats of criminal prosecution made for the purpose of compelling another to enter into a contract constitute duress.<sup>7</sup> It seems, however, that the offence for which arrest is threatened should be specified;<sup>8</sup> and that the party making the threat should have some present means of executing it,<sup>9</sup> but the authorities are not agreed.<sup>10</sup> In fact, the growth of equitable doctrines in the common law courts, and the confusion of legal and equitable

<sup>1</sup> *York v. Hinkle*, 80 Wis. 624; 50 N. W. 895; *McClair v. Wilson*, 18 Col. 82; 31 P. 502; *Dunham v. Griswold*, 100 N. Y. 224; 3 N. E. 76; *Whittaker v. Southwest Va. Improvement Co.*, 34 W. Va. 217; 12 S. E. 507; *Wilson S. M. Co. v. Curry*, 126 Ind. 161; 25 N. E. 896; *Jones v. Houghton*, 61 N. H. 51; *Burke v. Gould*, 105 Cal. 277; 38 P. 733.

<sup>2</sup> *Davis v. Rice*, 88 Ala. 388; 6 S. 751; *Wilcox v. Howland*, 23 Pick. 167.

<sup>3</sup> *Hall Lumber Co. v. Gastin*, 54 Mich. 624.

<sup>4</sup> *Kingsbury v. Sargent*, 83 Me. 230; 22 A. 105.

<sup>5</sup> *Parmentier v. Pater*, 13 Or. 121; 9 P. 59.

<sup>6</sup> *Morse v. Woodworth*, *supra*.

<sup>7</sup> *Thompson v. Niggley*, 53 Kans. 664; 35 P. 290.

<sup>8</sup> *Kruschke v. Stefan*, 83 Wis. 373; 53 N. W. 679.

<sup>9</sup> *Horton v. Bloedon*, 57 Neb. 666; 56 N. W. 321; *Higgins v. Brown*, 78 Me. 473; 5 A. 289.

<sup>10</sup> See *Morse v. Woodworth*, *supra*.

procedure in many States, have left the line between duress and undue influence too shadowy to be easily perceived.

It is often said that the imprisonment must be unlawful, or that threats made must be of an unlawful imprisonment, or that there must be an abuse of process. To take advantage of a lawful imprisonment or of threats of such imprisonment for the purpose of furthering one's private ends is regarded, however, as constituting duress.<sup>1</sup>

Duress to a third party exercised for the purpose of compelling another to execute a contract will in some cases entitle the party making the contract to avoid it. A husband may avoid for duress to his wife,<sup>2</sup> and a wife for duress to her husband.<sup>3</sup> A parent may avoid for duress to his child,<sup>4</sup> and a child for duress to his parent.<sup>5</sup> A sister may avoid for duress to her brother.<sup>6</sup> It has been held that a surety may avoid a contract for duress to his principal;<sup>7</sup> but this is not the law.<sup>8</sup>

Contracts voidable for duress come under the second head of voidable contracts. It is therefore necessary that the duress should be the act of the other party to the contract, or that he should seek to take advantage of duress practised by another.<sup>9</sup>

<sup>1</sup> *Morse v. Woodworth*, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; H. & W. 308.

<sup>2</sup> 1 Rolle Abr. 687.

<sup>3</sup> *City Nat. Bank v. Kusworm*, 88 Wis. 188; 59 N. W. 564.

<sup>4</sup> *Bryant v. Peck & Whipple Co.*, 154 Mass. 460; 28 N. E. 678; *McCormick, & Co. v. Hamilton*, 73 Wis. 486; 41 N. W. 727.

<sup>5</sup> 1 Rolle Abr. 687.

<sup>6</sup> *Schultz v. Catlin*, 78 Wis. 611; 47 N. W. 946.

<sup>7</sup> *Evans v. Huey*, 1 Bay, 13.

<sup>8</sup> *Bowman v. Hiller*, 130 Mass. 153; *Huscombe v. Standing, Cro. Jac.* 187; *Robinson v. Gould*, 11 Cush. 55; *Plummer v. People*, 16 Ill. 358.

<sup>9</sup> *Leake, Contracts*, 353; *Compton v. Bunker Hill Bank*, 96 Ill. 301;

(4) **UNFAIR DEALING.**—There are certain cases where a contract is voidable because one party has taken an unfair advantage of another. The contract in such cases is said to be voidable on the ground of undue influence. Unfair dealing, however, seems a more accurate expression than undue influence.

It is a general principle of equity that a person in whom confidence is placed by another shall not be permitted to abuse that confidence. Certain relations are essentially confidential; for example, the relation of trustee and *cestui que trust*, or of principal and agent. In other cases special confidence may be shown by one person in another in a particular case. There are various rules as to the burden of proof in different cases,<sup>1</sup> but the general principle is always the same, that equity will not tolerate an abuse of confidence, and will set aside contracts obtained by such abuse.

Unfair dealing for which a court of equity will set aside a contract may consist in actual undue influence. If a person's mind is so weak as to be easily influenced by others, a contract entered into by him will be set aside if there is any unfairness in it, if he acts without independent advice.<sup>2</sup>

Unfair dealing with an expectant heir in regard to his expectancy affords an equitable ground for the rescission of a contract; and inadequacy of compensation for such expectancy constitutes unfairness. This rule is altered in England by statute, but still prevails in this country.<sup>3</sup>

*Morse v. Woodworth*, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; H. & W. 308.

<sup>1</sup> See Pollock, *Contracts*, 557-575.

<sup>2</sup> *Allore v. Jewell*, 94 U. S. 506.

<sup>3</sup> Bigelow, *Fraud*, i. 370, 372.

## § 3. How Rescission is Effected.

(a) *Modes of Rescission.*

There are three ways in which rescission may be effected. These three modes of rescission are rescission in pais, rescission by plea, and judicial rescission.<sup>1</sup> Rescission in pais takes place when the party entitled to rescind does an act in pais which puts an end to the contract. Rescission by plea occurs when the party entitled to rescind sets up the fact justifying the rescission in repudiation of the contract in his plea. Here the plea not only constitutes a defence to the action, but is in itself the act which rescinds the contract. On principle such rescission must be by plea or answer, and not by reply. If the plaintiff states a cause of action and the defendant pleads a voidable contract in defence, the plaintiff should not be allowed to rescind by replying that the contract set up was voidable. By hypothesis, the plaintiff's right of action has been destroyed by the making of the voidable contract, and can be revived only by the rescission of that contract. To allow the plaintiff to rescind the contract by reply, therefore, is to allow him to acquire a cause of action after bringing suit, which is of course unsound.<sup>2</sup> The authorities, however, are in conflict. It has been held on the one hand that where rescission is attempted by reply, the reply will be allowed if the rights of the parties can be adjusted in one suit;<sup>3</sup> and on the other that such reply is insufficient to rescind the contract.<sup>4</sup>

Judicial rescission is brought about by the decree of

<sup>1</sup> Bigelow, *Fraud*, i. 75.

<sup>2</sup> *Ibid.*, i. 83.

<sup>3</sup> *Brewster v. Brewster*, 38 N. J. Eq. 119.

<sup>4</sup> *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479; *Potter v. Monmouth Fire Ins. Co.*, 63 Me. 440; *Gould v. Cayuga Bank*, 86 N. Y. 75

a court of equity, which has exclusive jurisdiction over actions for the rescission of contracts.

We have now to consider when each of these different modes of rescission may be used; and first, as to judicial rescission. The fundamental ground of equity jurisdiction is that the complainant has no adequate remedy at law. Judicial rescission therefore is granted on the ground that rescission in pais or by plea is not adequate to protect the rights of the party injured. Now a court of law can never grant rescission of a contract; it can only recognize the fact that the contract has been rescinded either by act in pais or by plea. Whenever, therefore, the cancellation of a written document is necessary to the protection of a party's rights he must go into equity to procure such cancellation. Moreover, there are certain facts which equity recognizes as grounds for rescinding a contract which are not recognized at law. Undue influence and innocent misrepresentation<sup>1</sup> will entitle a party to rescission in equity, but not at law. Again, the form of the contract determines whether or not judicial rescission is necessary. A deed can be avoided at law only on the ground of infancy, of mental incapacity, or of duress. Fraud, mistake, misrepresentation, undue influence, affect the deed only in equity. This rule still prevails in the United States courts,<sup>2</sup> though it has been generally modified by statute or by the practice of allowing equitable defences in an action at law.

Rescission by plea is proper when the ground for

<sup>1</sup> In the cases where innocent misrepresentation is recognized at law as a defence, such recognition is given because the truth of the representations is made an implied condition of the contract.

<sup>2</sup> *George v. Tate*, 102 U. S. 564; *Hartshorn v. Day*, 19 How. 211. "The obligor . . . was helpless against an obligee who had the specialty." Ames, 9 *Harvard Law Rev.* 50.

## 262 ELEMENTS OF THE LAW OF CONTRACTS.

rescission is one which the court can recognize, and the contract has not already been rescinded. If the contract has already been rescinded in pais the plea merely states a defence to the action.

Rescission in pais is proper whenever judicial rescission is unnecessary.

### *(b) Requisites of Rescission.*

The object of rescission is the restoration of the parties to their original position. If the contract is wholly executory on both sides, and does not require judicial rescission, a simple refusal to perform will constitute a sufficient rescission in pais, and a plea of the facts constituting the ground for rescission is a sufficient rescission by plea. If, however, one party has received something from the other, can he rescind the contract by a simple refusal to perform? The answer to this question depends upon the ground on which rescission is sought.

An infant may avoid his contract by a simple refusal to perform.<sup>1</sup> We are not here concerned with the question whether he can recover property with which he has parted or not, but only with the infant's obligations. An exception to this rule prevails in cases where the infant has acquired an interest in permanent property to the possession of which interest certain obligations are attached. In such cases the infant can avoid his obligations only by a disclaimer of his interest in the property. Thus an infant lessee who retains possession of leased premises after he becomes of age renders himself liable for arrears of rent accruing during his minority.<sup>2</sup> So an infant who becomes a stockholder in a

<sup>1</sup> *Craighead v. Wells*, 21 Mo. 404, 409.

<sup>2</sup> *Rolle's Abr.* 731.

corporation is liable on his stock like any other stockholder, unless he disaffirms the purchase within a reasonable time after coming of age.<sup>1</sup> Whether an infant who becomes a member of a firm must disclaim his interest in the partnership when he comes of age in order to avoid liability to the creditors of the firm is not clearly settled.<sup>2</sup> A marriage settlement must be repudiated by an infant when he comes of age or he will be bound by it.<sup>3</sup>

The authorities are at variance as to the right of a person to rescind a contract on the ground of mental incapacity without restoring what he has received. In Massachusetts the same rule is applied to insane persons as to infants. The courts hold that the law "intends that he who deals with infants or insane persons shall do so at his peril." The insane person therefore may avoid his contract without first restoring what he has received.<sup>4</sup> Other courts hold that the restoration of what he has received under the contract is a condition precedent to the right to rescind on the ground of mental incapacity.<sup>5</sup> The dictum in *Molton v. Camroux*<sup>6</sup> that where one dealing with the insane person acts in good faith and without notice of the insanity, and the contract is fair and cannot be rescinded so as to place the parties *in statu quo*, the contract will not be set aside, has been often repeated, but does not furnish a satis-

<sup>1</sup> *London & N. W. Ry. v. M'Michael*, 5 Ex. 114; *Dublin & Wicklow Ry. v. Black*, 8 Ex. 181.

<sup>2</sup> See *Bates, Partnership*, § 145.

<sup>3</sup> *Carter v. Silber* (1892), 2 Ch. 278; affirmed *sub nom. Edwards v. Carter* (1893), A. C. 360.

<sup>4</sup> *Gibson v. Soper*, 6 Gray, 279.

<sup>5</sup> *Joest v. Williams*, 42 Ind. 565; *Pattee's Cases on Contracts*, 155.

<sup>6</sup> 2 Ex. 487; 4 Ex. 17; *Ewell's L. C.* 614.



factory solution of the question, for reasons already given.<sup>1</sup>

With the exception of the cases of infancy and mental incapacity, it is a general principle that rescission is granted only where there can be a *restitutio in integrum*; and that the party seeking rescission shall do everything in his power to bring about such restitution.<sup>2</sup> This rule is not absolute, but rests on general principles of equity. Accordingly if the party seeking to rescind has received no benefit from the contract he may obtain rescission even where there can be no *restitutio in integrum*. Thus where A. was induced by B.'s misrepresentation to form a partnership with B., it was held that A. was entitled to rescission of the contract of partnership, and to the recovery of the capital he had put in, although the partnership business had failed.<sup>3</sup> So where A. sold property to B., and the contract was voidable on account of A.'s misrepresentations, B. was allowed to rescind the contract, although the property had been taken from B. by a sale under a prior lien.<sup>4</sup> So where the thing received has been destroyed, rescission will nevertheless be granted.<sup>5</sup> And in any case where without fault of his own the party seeking rescission is unable to restore what he has received, rescission will nevertheless be granted if the court can so mould its decree as to restore the parties to their original position.<sup>6</sup>

<sup>1</sup> *Ante*, p. 235.

<sup>2</sup> Bigelow, *Fraud*, i. 420; *Savery v. King*, 5 H. L. C. 627; *Urquhart v. McPherson*, 3 A. C. 831; *Neblett v. Macfarland*, 92 U. S. 101; *Doane v. Lockwood*, 115 Ill. 490; *Carlson v. Segog*, 62 N. W. 1132; — *Minn.* —; *The Ernest M. Munn*, 66 F. 356; — U. S. App. —.

<sup>3</sup> *Adam v. Newbigging*, 13 A. C. 308.

<sup>4</sup> *Henninger v. Heald*, 51 N. J. Eq. 74; 26 A. 449.

<sup>5</sup> *Neblett v. Macfarland*, *supra*; *Scott v. Perrin*, 4 Bibb, 360.

<sup>6</sup> *Thackrah v. Haas*, 119 U. S. 499; 7 S. Ct. 311; *Savery v. King*, *supra*.

Tender of what one has received is essential if the thing received is of any value whatever to either party.<sup>1</sup>

If the party seeking rescission has by his own act rendered a *restitutio in integrum* impossible he is not entitled to rescission, although he may have acted in ignorance of the facts rendering the contract voidable.<sup>2</sup>

Rescission need not go to the whole contract if the contract is divisible, and the cause for rescission affects only part of the contract. If, however, either the promise or the consideration be indivisible, there can be no partial rescission.<sup>3</sup>

**§ 4. How the Right of Rescission may be Lost.**

The right of rescission may be barred by ratification, by laches, and by the statute of limitations.

*(a) Ratification.*

Certain peculiar rules governing infants' contracts render it necessary to examine the question of ratification of such contracts separately.

An infant can ratify a voidable contract only after attaining majority. In order that the ratification may be set up in a given action, it must take place before that action is brought.<sup>4</sup>

What will constitute a ratification depends upon the nature of the transaction. Where an infant purchases

<sup>1</sup> Bigelow, *Fraud*, i. 426; *Bassett v. Brown*, 105 Mass. 551; *Fewell v. Deane*, 21 S. E. 1; — S. C. —.

<sup>2</sup> Bigelow, *Fraud*, i. 423; *McCrillis v. Carlton*, 37 Vt. 139; *Handforth v. Jackson*, 150 Mass. 149; 22 N. E. 634; *Rigdon v. Walcott*, 141 Ill. 649; 31 N. E. 158.

<sup>3</sup> Bigelow, *Fraud*, i. 422; *Barrie v. Earle*, 143 Mass. 1; 8 N. E. 639; *Merrill v. Wilson*, 66 Mich. 232; 33 N. W. 716.

<sup>4</sup> *Thornton v. Illingworth*, 2 B. & C. 824; *Ford v. Phillips*, 1 Pick. 202; *Hale v. Gerrish*, 8 N. H. 374; *Ewell's L. C.* 171; *contra*, *Buchanan v. Hubbard*, 119 Ind. 187; 21 N. E. 538.

property, any act after he attains majority consistent only with an intention on his part to assert his ownership of the property will amount to a ratification.<sup>1</sup> Thus the sale of the property<sup>2</sup> or the retention of it for an unreasonable length of time,<sup>3</sup> will amount to a ratification of the purchase. The retention of the property, however, may be so explained as not to constitute a ratification. Thus where lumber was furnished to an infant for building a house, it was held that retention of the property after the infant came of age did not amount to a ratification, the lumber having lost its original form.<sup>4</sup>

Any act showing that a person intends to be bound by a contract which he made before coming of age will constitute a ratification. Bringing suit on the contract is of course a ratification.<sup>5</sup>

Where there is a contract by an infant to serve for a given time, which extends beyond his minority, if the infant remains in his employer's service after coming of age he ratifies the contract.<sup>6</sup>

Where an infant buys land and gives a purchase-money mortgage, by asserting his title to the land after coming of age, he ratifies the mortgage.<sup>7</sup>

Only acts which show an intention on the part of the infant to affirm the contract can constitute a ratification. A mere failure to disaffirm the contract does not amount

<sup>1</sup> *Lawson v. Lovejoy*, 8 Me. 405; *Ewell's L. C.* 166; *Henry v. Root*, 33 N. Y. 526; *Pattee's Cases on Contracts*, 20.

<sup>2</sup> *Lawson v. Lovejoy*, *supra*; *Henry v. Root*, *supra*.

<sup>3</sup> *Delano v. Blake*, 11 Wend. 85; *Boyden v. Boyden*, 9 Pick. 519; *Pattee's Cases on Contracts*, 94.

<sup>4</sup> *Bloomer v. Nolan*, 36 Neb. 51; 53 N. W. 1039.

<sup>5</sup> *Middleton v. Hoge*, 5 Bush, 478.

<sup>6</sup> *Forsyth v. Hastings*, 27 Vt. 646; *State v. Dimick*, 12 N. H. 194.

<sup>7</sup> *Uecker v. Koehn*, 21 Neb. 559; 32 N. W. 583; *Kennedy v. Baker*, 159 Pa. St. 146; 28 A. 252; *Robbins v. Eaton*, 10 N. H. 561.

to a ratification.<sup>1</sup> There is an exception to this rule, as we have seen, where an infant acquires property to which certain obligations are attached. In such cases, failure to disaffirm the purchase within a reasonable time after arriving at majority constitutes a ratification of the purchase.<sup>2</sup>

A mere acknowledgment that a debt is due is insufficient,<sup>3</sup> even though accompanied by a statement that the creditor will get his pay.<sup>4</sup> Part payment of a debt will not amount to a ratification;<sup>5</sup> nor will an offer to compromise.<sup>6</sup>

The making of a will directing that the testator's just debts should be paid has been held not to amount to a ratification of debts contracted during minority.<sup>7</sup>

Ratification must be voluntary, and not brought about by fear of arrest.<sup>8</sup>

A ratification is valid though made in ignorance of the law giving the party the right to avoid his contract on the ground of infancy.<sup>9</sup>

<sup>1</sup> *Smith v. Kelley*, 13 Met. 309; *Ford v. Phillips*, 1 Pick. 202; *Goodsell v. Myers*, 3 Wend. 479; *Pattee's Cases on Contracts*, 19; *Carrell v. Potter*, 23 Mich. 377.

<sup>2</sup> *Ante*, p. 262.

<sup>3</sup> *Ford v. Phillips*, *supra*; *Kendrick v. Neisz*, 17 Col. 506; 30 P. 245; *Goodsell v. Myers*, *supra*.

<sup>4</sup> *Hale v. Gerrish*, 8 N. H. 374; *Ewell's L. C.* 171.

<sup>5</sup> *Kendrick v. Neisz*, *supra*; *Catlin v. Haddex*, 49 Conn. 492; *Hinely v. Margaritz*, 3 Pa. St. 428; *contra*, *American Mtg. Co. v. Wright*, 101 Ala. 658; 14 S. 399.

<sup>6</sup> *Bennett v. Collins*, 52 Conn. 1.

<sup>7</sup> *Smith v. Mayo*, 9 Mass. 62; but see *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. Ch. 544.

<sup>8</sup> *Harmer v. Killing*, 5 Esp. 102.

<sup>9</sup> *Morse v. Wheeler*, 4 Allen, 570; *Anderson v. Soward*, 40 Ohio St. 325; *American Mtg. Co. v. Wright*, *supra*; *Clark v. Van Court*, 100 Ind. 113, overruling *Felton v. Wiseman*, 40 Ind. 148; *contra*, *Hinely v. Margaritz*, *supra*.

Ratification may be conditional, in which case the condition must be performed in order that the ratification may be set up to overcome the defence of infancy.<sup>1</sup>

The subject of infants' contracts in England is now governed by the Infants' Relief Act of 1874.<sup>2</sup>

Contracts made by parties lacking in mental capacity may be ratified when the disability ceases.<sup>3</sup> Knowledge of the law rendering such contracts voidable is not essential to the validity of such ratification.<sup>4</sup> It seems that the acts set up as constituting a ratification must, as in the case of an infant's contracts, show an intention to affirm the contract.

In the case of contracts voidable for mistake, misrepresentation, fraud, or unfair dealing, ratification consists in some act or course of conduct showing, first, a knowledge of the facts rendering the contract voidable; and secondly, a willingness to abide by the contract. An act done in ignorance of the facts rendering the contract voidable cannot be a ratification of the contract.<sup>5</sup>

In every case of a voidable contract the injured party has his election to affirm or disaffirm the contract. "Any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the

<sup>1</sup> *Everson v. Carpenter*, 17 Wend. 419; *Proctor v. Sears*, 4 Allen, 95; *Kendrick v. Neisz*, 17 Col. 506; *State v. Binder*, 31 A. 215; — N. J. L. —.

<sup>2</sup> Anson, *Contracts* (8th ed.), 111.

<sup>3</sup> *Carpenter v. Rodgers*, 61 Mich. 384; 28 N. W. 156.

<sup>4</sup> *Arnold v. Richmond Iron Works*, 1 Gray, 434.

<sup>5</sup> *Brophy v. Lawler*, 107 Ill. 284; *Baker v. Maxwell*, 99 Ala. 558; 14 S. 468; *Kraus v. Thompson*, 30 Minn. 64; *Pratt v. Philbrook*, 41 Me. 132; *Hays v. Midas*, 104 N. Y. 602; 11 N. E. 141; *Equitable Co-op Foundry v. Hersee*, 103 N. Y. 25; 9 N. E. 487.

case of inconsistent remedies."<sup>1</sup> The commencement of an action on the contract is therefore a ratification.<sup>2</sup> Merely advertising land for sale under a mortgage after filing a bill to rescind the mortgage for fraud is not a ratification of the mortgage, where no attempt to sell is made.<sup>3</sup> Where the plaintiff tenders back property received under a voidable contract, and the property is refused, rescission takes place, and a subsequent sale of the property by the plaintiff is not a ratification of the contract.<sup>4</sup>

In order to constitute an election there must be a deliberate assertion of one of two alternative rights. An action brought hastily upon the contract, and afterwards dismissed, is not, therefore, a bar to a subsequent rescission of the contract.<sup>5</sup> Deliberation, however, is presumed in such cases, but the presumption is rebuttable.<sup>6</sup> Election is sometimes confounded with estoppel,<sup>7</sup> though the distinction is very clear. The deliberate act of one party constitutes an election, while an estoppel can arise only when the other party's position has been changed.<sup>8</sup>

(b) *Laches*.

Laches consists in the neglect to assert a right. "The length of time during which the party neglects

<sup>1</sup> *Robb v. Vos*, 155 U. S. 13, 43.

<sup>2</sup> *Thompson v. Howard*, 31 Mich. 309; *Thomas v. Watt*, 62 N. W. 345; — Mich. —; *Evans v. Rothschild*, 54 Kans. 747; 39 P. 701; *Connihan v. Thompson*, 111 Mass. 270; *Conrow v. Little*, 115 N. Y. 387; 22 N. E. 346.

<sup>3</sup> *Watts v. British & Am. Mtg. Co.*, 60 F. 483; 9 C. C. A. 98.

<sup>4</sup> *Barnett v. Speir*, 93 Ga. 762; 21 S. E. 168.

<sup>5</sup> *Johnson-Brinkman Co. v. Missouri Pac. Ry. Co.*, 126 Mo. 344; 28 S. W. 870.

<sup>6</sup> *Bigelow*, *Fraud*, i. 437.

<sup>7</sup> As in *Johnson-Brinkman Co. v. Missouri Pac. Ry. Co.*, *supra*.

<sup>8</sup> 3 *Northwestern Law Review*, 157.

the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defence, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."<sup>1</sup> Laches cannot be imputed to one who is ignorant of his rights.<sup>2</sup>

(c) *Statutes of Limitations.*

The statute of limitations may prevent the bringing of an action for rescission, and it may operate also to bar rescission by plea.

<sup>1</sup> *Halstead v. Grinnan*, 152 U. S. 412, 416; *Alsop v. Riker*, 155 U. S. 448.

<sup>2</sup> *Halstead v. Grinnan*, *supra*; *Lasher v. M'Creery*, 66 F. 834.

## CHAPTER IX.

## THE ASSIGNMENT OF CONTRACT.

## § 1. At Common Law.

The right to enforce a contract is a chose in action. Choses in action at common law were in general not assignable by the act of the owner. At common law, therefore, the attempt of a party to a contract to transfer his rights thereunder to a third party had no effect.<sup>1</sup> An exception to this rule was recognized by the law merchant in the case of bills of exchange. Bills of exchange are negotiable; that is, the bill is regarded as a thing to which the legal title may be transferred in some cases by delivery, and in any case by indorsement. Whether promissory notes were also negotiable was a disputed question, but the statute of 3 & 4 Anne, c. 9, settled their negotiability. Checks are negotiable; and in this country corporate bonds payable to bearer are negotiable by custom.<sup>2</sup>

## § 2. In Equity.

In equity different rules prevail. While an assignment of an ordinary contract in equity does not give the assignee the title to that contract, the assignment imposes certain duties on the assignor and on the other party to the contract. These duties, though originally ignored by the common-law courts, were enforced in

<sup>1</sup> *Glenn v. Marbury*, 145 U. S. 499; 12 S. Ct. 914.

<sup>2</sup> *White v. Vermont & Mass. R. R. Co.*, 21 How. 575.



equity. When a party to a contract has assigned his rights thereunder, a court of equity will compel him to respect such assignment. The assignee may therefore compel the assignor to permit him to sue at law in the assignor's name, upon giving the assignor indemnity against the costs of the action.<sup>1</sup> The other party to the contract will also be compelled to respect the rights of the assignee in so far as he has notice thereof.

Even in equity not all contracts are assignable. Whenever the personal performance of the contract by the assignor is of the essence of the contract, an assignment of the contract while the assignor is still under any obligation to perform the contract personally is ineffectual. Thus where A. hired a carriage of B., a coachmaker, for five years at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker, it was held that B. could not assign the contract, since it involved personal performance on his part.<sup>2</sup> But where certain railway wagons were let with an agreement that the owner would keep them in repair, and "cause them to be repaired" upon notice, it was held that the contract was not personal in its nature and could be assigned.<sup>3</sup>

When the contract involves the performance by one party of his part of the contract on the strength of the other party's credit, the one to whom credit is given cannot assign the contract so that the other party can be compelled to accept the credit of the assignee, for the giving of credit rests on the personal confidence of the creditor in the debtor.<sup>4</sup> But when goods are to be paid

<sup>1</sup> *Crouch v. Credit Foncier*, L. R. 8 Q. B. 380; *Henderson v. Welch*, 3 Gilm. 340.

<sup>2</sup> *Robson v. Drummond*, 2 B. & Ad. 303.

<sup>3</sup> *British Waggon Co. v. Lea*, 5 Q. B. D. 149; W. 449.

<sup>4</sup> *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379; 8 S. Ct. 1308; W. 453; H. & W. 438.

for on delivery, the vendee can assign his rights under the contract, though not his liabilities.<sup>1</sup> In short, a party cannot be compelled to accept any other performance of a contract than that for which he has bargained; and in so far as the assignor's rights under the contract are necessarily bound up with his liabilities thereunder, since the liabilities cannot be assigned, the rights cannot be assigned.

To constitute an equitable assignment there must be some significant act expressing the intention of the assignor that the assignee shall have the debt or right in question. If the assignment is voluntary, that is, without consideration, enough must have been done by the assignor to make a complete gift of the chose in action; for if the transfer is incomplete, equity will not aid a volunteer by compelling its completion.<sup>2</sup>

The assignment of part of a fund is generally recognized in equity as valid.<sup>3</sup> Whether such assignment is good without the consent of the debtor is a disputed point.<sup>4</sup> A distinction is drawn in some States between assignments of claims against individuals and against public corporations, and partial assignments of claims against the latter are held to be against public policy, as tending to embarrass the administration of public affairs.<sup>5</sup>

<sup>1</sup> *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N. Y. 209; 31 N. E. 1018; H. & W. 447.

<sup>2</sup> *Harding v. Harding*, 17 Q. B. D. 442.

<sup>3</sup> *James v. Newton*, 142 Mass. 366; 8 N. E. 122; W. 461; *Field v. Mayor*, 2 Seld. 179; H. & W. 453; *Ex parte Moss*, 14 Q. B. D. 310; *Warren v. First Nat. Bk.*, 149 Ill. 9; 38 N. E. 122.

<sup>4</sup> *James v. Newton*, *supra*. That the debtor's consent is necessary, see *Mandeville v. Welch*, 5 Wheat. 277; *contra*, *Field v. Mayor*, *supra*; *Warren v. First Nat. Bk.*, *supra*.

<sup>5</sup> *Delaware County v. Diebold Safe Co.*, 133 U. S. 473; 10 S. Ct. 399.

## 274 ELEMENTS OF THE LAW OF CONTRACTS.

An assignment may be made before a right has accrued, and if made upon a valuable consideration it will be given effect by a court of equity when the right does come into existence.<sup>1</sup>

In order that an assignment may impose any duty to the assignee upon the party liable under the contract, it is necessary that such party should have notice of the assignment;<sup>2</sup> but as between assignor and assignee the assignment is good without notice.<sup>3</sup>

The growth of equitable ideas in the common-law courts has modified the doctrines of such courts with reference to assignments. Courts of law will now protect the interest of the assignee of the whole of a fund, so that the debtor cannot deal with the assignor after notice of assignment to the detriment of the assignee.<sup>4</sup> In many States statutes authorize the assignee to sue in his own name at law. Even in the States where the common-law rule prevails and the assignee can sue at law only in the name of the assignor, the assignee's rights are so well protected by the common-law courts that it is only in exceptional instances that the assignee of the whole of a fund can bring suit in equity to enforce his claim;<sup>5</sup> but the assignee of part of a claim must always sue in equity.<sup>6</sup>

The assignment of a contract transfers to the assignee only such rights as his assignor possesses against the other party at the time the latter receives notice of the

<sup>1</sup> *Field v. Mayor*, *supra*; *Peugh v. Porter*, 112 U. S. 737; 5 S. Ct. 361.

<sup>2</sup> *Spain v. Hamilton*, 1 Wall. 604.

<sup>3</sup> *Gorringe v. Irwell Works*, 34 C. D. 128.

<sup>4</sup> *Welch v. Mandeville*, 1 Wheat. 233.

<sup>5</sup> *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205; 2 S. Ct. 279; *Hayward v. Andrews*, 106 U. S. 672; 1 S. Ct. 544; *Carter v. United Ins. Co.*, 1 Johns. Ch. 463; H. & W. 452.

<sup>6</sup> *Field v. Mayor*, 2 Seld. 179; H. & W. 453.

assignment,<sup>1</sup> unless the contract itself provides that the assignee shall have greater rights than his assignor.<sup>2</sup>

As between successive assignments of the same fund there are two theories as to the priority of the different assignees. According to the highest authority in England and America a purchaser for value and without notice of a prior assignment who gives notice to the debtor or trustee is entitled to priority over a prior assignee who has failed to give such notice.<sup>3</sup> Various State courts, however, hold that successive assignments have priority according to the order in which they are actually made.<sup>4</sup>

### § 3. Negotiability.

Some contracts are negotiable as well as assignable. Bills of exchange, promissory notes, and checks are negotiable instruments; other instruments may be negotiable by custom or statute. An instrument which is negotiable is looked upon for many purposes as a thing. The instrument is ordinarily regarded as the contract, and the transfer of the legal title to the instrument transfers the right to sue at law on the contract. The transfer of the legal title takes place by indorsement, if the instrument is payable to order; by delivery, if the instrument is payable to bearer. If the legal title is not transferred, as where a note payable to order is transferred by delivery, the transferee's rights are

<sup>1</sup> *Mangles v. Dixon*, 3 H. L. C. 702; *United States v. Buford*, 3 Pet. 12; *Scott v. Shreeve*, 12 Wheat. 605.

<sup>2</sup> *Re Blakely Ordnance Co.*, L. R. 3 Ch. 156; *Ex parte Asiatic Banking Ass'n*, L. R. 2 Ch. 397.

<sup>3</sup> *Dearle v. Hall*, 3 Russ. 1; *Foster v. Cockerell*, 3 Cl. & F. 456; *Judson v. Corcoran*, 17 How. 612, 615; *Spain v. Hamilton*, 1 Wall. 604, 623; *Methven v. Staten Island Light Co.*, 66 F. 113; — U. S. App. —.

<sup>4</sup> *Thayer v. Daniels*, 113 Mass. 129; *Muir v. Schenck*, 3 Hill, 228; *Sutherland v. Reeve*, 151 Ill. 384; 38 N. E. 130.

simply those of an assignee of any chose in action. He must sue at law in the name of his assignor, and he stands in his assignor's shoes. The transfer of the legal title to the instrument, however, places the transferee on an entirely different footing. He becomes the owner of the instrument, and may enforce the contract in his own name. Moreover, if he is a purchaser of the instrument for value before maturity, and without notice of any defences, he becomes entitled to demand of the party liable on the instrument the sum of money called for by the contract, and may therefore stand in a better position than his assignor. The special rules governing negotiable instruments belong not to the general law of contracts, but to the law merchant.<sup>1</sup>

#### § 4. Assignment by Operation of Law.

A chose in action may be transferred from one person to another by operation of law. The ordinary ways in which such transfer takes place are by death, by marriage, by bankruptcy or insolvency, and by the conveyance of land.

##### (a) *By Death.*

The executor or administrator of a deceased person succeeds to the personal estate of the deceased, and becomes liable in his representative capacity for all claims against such estate. If a contract involves the personal performance of any essential act by the deceased the contract is construed as conditional on his life, and is terminated by his death.<sup>2</sup>

Rights of action for breaches of contract occurring in the lifetime of a deceased person pass to his executor or

<sup>1</sup> The student will find the subject of Negotiable Instruments ably treated in Bigelow on Bills and Notes.

<sup>2</sup> *Dickinson v. Calahan*, 19 Pa. St. 227; H. & W. 479.

administrator; but the personal representative cannot recover any damages for strictly personal injuries. Thus in a suit for breach of promise of marriage, the executor of the injured party can recover only the pecuniary damages sustained by his testator.<sup>1</sup>

*(b) By Marriage.*

At common law, upon a woman's marriage, the right to collect her choses in action passed to her husband. If, however, he failed to reduce them into possession during coverture her rights remained unchanged by the coverture.<sup>2</sup> The marriage also made the husband jointly liable with his wife for all liabilities she had incurred before marriage;<sup>3</sup> but this liability existed only during coverture.<sup>4</sup> The rights of married women are now almost universally altered by statute.

*(c) By Bankruptcy and Insolvency.*

Statutes in some jurisdictions provide for the involuntary transfer of the property of an insolvent debtor to a trustee.

*(d) By the Transfer of Land.*

The transfer of land has the effect to transfer the benefit of certain contracts, and the obligation of certain contracts in regard to that land. The subject of covenants running with the land, however, is more properly treated in a work on Real Property.

<sup>1</sup> Chamberlain v. Williamson, 2 M. & S. 408.

<sup>2</sup> Fleet v. Perrins, L. R. 4 Q. B. 500.

<sup>3</sup> Platner v. Patchin, 19 Wis. 333; H. & W. 478.

<sup>4</sup> Bell v. Stocker, 10 Q. B. D. 129.

## CHAPTER X.

## THE DISCHARGE OF CONTRACT.

CONTRACTUAL obligation may be discharged by performance; by the happening of an event which is an internal condition subsequent; by the happening of an event which is an external condition subsequent; and by the discharge of the right of action arising from breach of contract.

## § 1. Performance.

The performance of an obligation necessarily discharges that obligation. The performance must be in strict accordance with the terms of the contract, subject only to the rule *de minimis non curat lex*. It is held in some states that substantial performance in good faith of a condition precedent may be sufficient;<sup>1</sup> but this rule applies only to the performance of conditions, not to the performance of obligations.

Performance in a different manner from that called for by the contract will discharge the obligation if such performance is accepted by the promisee;<sup>2</sup> and if the promisee requests a change in the manner of performance, the promisor is discharged if the promisee prevents him from performing in the substituted manner.<sup>3</sup>

<sup>1</sup> *Nolan v. Whitney*, 88 N. Y. 648; W. 575; H. & W. 542; *ante*, p. 162.

<sup>2</sup> *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; *Swain v. Seamens*, 9 Wall. 254; *Rogers v. Rogers*, 139 Mass. 440; 1 N. E. 122.

<sup>3</sup> *Cummings v. Arnold*, 3 Met. 486; *Stearns v. Hall*, 9 Cush. 31.

It makes no difference in this respect whether the original contract is within the Statute of Frauds or not.<sup>1</sup>

Performance may be conditional; that is to say, an act may be accepted as performance, subject to some condition subsequent. If the condition subsequent happens, the performance no longer operates as a discharge of the obligation, and the promisee has a right of action on the original contract. A common instance of conditional performance is where a negotiable instrument is given in discharge of an obligation. Such an instrument may operate either as an absolute or as a conditional discharge. If the discharge is absolute, the original obligation is forever gone; if the discharge is conditional, the obligation is discharged by the negotiable instrument; but if the negotiable instrument is dishonored at maturity, the original obligation is revived. Whether a negotiable instrument is to operate as a conditional or as an absolute discharge of the original obligation is a question of intention. There is a conflict of authority as to the presumption in such a case, but the weight of authority supports the view that a negotiable instrument is presumed, in the absence of evidence, to operate only as a conditional discharge.<sup>2</sup>

## § 2. Tender.

Tender is not equivalent to performance. Tender consists in attempted performance.<sup>3</sup> If the promise is to pay money, tender of the money, if the tender is kept good, will stop the running of interest, and will prevent the promisee from recovering costs. If the contract to

<sup>1</sup> Browne, *Statute of Frauds*, §§ 423, 424.

<sup>2</sup> The cases are collected in *Benjamin on Sales* (Bennett's 6th ed.), pp. 723-727.

<sup>3</sup> Anson, *Contracts* (8th ed.), 284.



pay the money is unilateral, the obligation to pay is not discharged by the tender. If the contract is bilateral, a refusal by the promisee to accept performance may amount to a renunciation of the contract, and may be treated by the promisor as a discharge of the contract.<sup>1</sup> If the contract is unilateral, and is not for the payment of money, a refusal to accept performance will discharge the promisor.<sup>2</sup> Tender must, of course, correspond in all respects to the terms of the contract.<sup>3</sup>

### § 3. Internal Conditions Subsequent.

The happening of an event which is an internal condition subsequent, that is to say, which is a condition subsequent according to the construction of the contract itself, will discharge the contract. Thus in a contract of sale with a provision that the thing sold may be returned if not satisfactory to the vendee, the return of the thing sold will discharge the vendee's obligation to pay for it.<sup>4</sup> There are other internal conditions which are not expressed in terms, but which are, nevertheless, according to a true construction of the contract, part of the contract. Among such internal conditions may be mentioned legal impossibility; the death of a party to a contract for personal services; and the destruction of the subject-matter of the contract. The circumstances under which such events will be construed as internal conditions subsequent have been already explained in the chapter on the Construction of Contracts. Again, the failure of a thing sold to answer the description in the contract of sale may, if the article is actually

<sup>1</sup> See *post*, pp. 287 *et seq.*

<sup>2</sup> *Lamb v. Lathrop*, 13 Wend. 95.

<sup>3</sup> *Patch v. Collins*, 158 Mass. 468; 33 N. E. 567; *Dixon v. Clarke*, 5 C. B. 379.

<sup>4</sup> *Buckstaff v. Russell*, 151 U. S. 626; and see *Head v. Tattersall*, L. R. 7 Ex. 7.

received, amount to a condition subsequent entitling the vendee to return the article and thereby be discharged from his obligation to pay for it. In England the right of return is limited to cases where the thing received is essentially different from the thing bargained for. Some of the American courts allow a mere breach of warranty to be treated as a condition subsequent,<sup>1</sup> but the English rule is more commonly followed.<sup>2</sup>

**§ 4. External Conditions Subsequent.**

The external conditions subsequent which will discharge contractual obligation, that is, the facts which the law recognizes as discharging such obligation, include waiver; gift; release; the substitution of a new contract; breach of contract; repudiation; "failure of consideration"; the alteration or loss of a written instrument; merger, and estoppel.

*(a) Waiver.*

Waiver is not sufficient to discharge a contract in this country, nor generally in England. In the case of a bill of exchange or promissory note the English courts have held that waiver by the holder of his rights will discharge the parties to the instrument.<sup>3</sup> Such waiver is now required by the Bills of Exchange Act, 45 & 46 Vict., c. 16, § 62, to be in writing.

*(b) Gift.*

The promisee may make a gift of the obligation to the promisor. A gift must be executed; that is, there must

<sup>1</sup> *Bryant v. Isburgh*, 13 Gray, 607; H. & W. 609.

<sup>2</sup> *Freyman v. Knecht*, 78 Pa. St. 141; H. & W. 607; Benjamin on Sales (Bennett's 6th ed.), 904.

<sup>3</sup> *Foster v. Dawber*, 6 Ex. 839.

be an act done sufficient in law to amount to a transfer of the property given. A chose in action is, of course, the subject of gift. If the chose in action is evidenced by a written instrument, delivery of the instrument is ordinarily necessary.<sup>1</sup> If delivery is impossible, a receipt in full is sufficient, if executed with the intention of making a gift.<sup>2</sup>

(c) *Release.*

A release at common law is a deed discharging an obligation. A release may be conditional, subject either to a condition precedent or to a condition subsequent. Thus in *Gibbons v. Vouillon*,<sup>3</sup> a deed provided that the defendant should carry on business under the inspection of trustees; that his creditors, who were parties to the deed, should not sue him for five years; and that if any creditor should interfere with the defendant the defendant's obligation to such creditor should be discharged. It was held that the deed operated as a release, subject to the condition precedent of the plaintiff's interference with the defendant. On the other hand, where a deed of composition contained a release of their claims by the creditors, with a condition that the release should be void if the composition was not paid, the non-payment of the composition was held to restore the creditors to their original rights.<sup>4</sup>

A release must be distinguished from a covenant not to sue. A release discharges the obligation, while a

<sup>1</sup> *Young v. Power*, 41 Miss. 197; *Buswell v. Fuller*, 156 Mass. 309; 31 N. E. 294; *Slade v. Muntre*, 156 Mass. 19; 30 N. E. 168; *Young v. Young*, 80 N. Y. 422.

<sup>2</sup> *Green v. Langdon*, 28 Mich. 221; *Lewis's Estate*, 139 Pa. St. 640; 22 A. 635; *McKenzie v. Harrison*, 120 N. Y. 260; 24 N. E. 458.

<sup>3</sup> 8 C. B. 483; W. 311.

<sup>4</sup> *Newington v. Levy*, L. R. 6 C. P. 180.

covenant not to sue is an independent contract, and does not affect the right of action on the original claim.<sup>1</sup> A covenant never to sue, however, may be pleaded in bar of the action by the covenantee, in order to prevent circuity of action.<sup>2</sup> A covenant not to sue is purely a personal defence, available only between the parties to the covenant.<sup>3</sup>

A release, being under seal, requires no consideration at common law. In some States, however, statutes have been passed declaring that "a seal is only presumptive evidence of consideration." The effect of such statutes is to make a release invalid without consideration.<sup>4</sup> In New Jersey, however, a different interpretation is placed on such a statute; and a sealed instrument without consideration is held binding if the parties intended there should be no consideration.<sup>5</sup>

(d) *New Contract.*

A contract may be discharged by another contract. A contract to discharge an existing contract may be inferred from the making of another contract inconsistent with the first.<sup>6</sup> In case the first contract is bilateral, an agreement by each party to release the other is a new contract which consists of the mutual promises of the parties.<sup>7</sup> In case the first contract is unilateral a mere agreement to discharge the contract is, of course, not binding on the promisee unless there is some distinct consideration for his promise to dis-

<sup>1</sup> *Ford v. Beech*, 11 Q. B. 852; W. 323.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Dean v. Newhall*, 8 T. R. 168; *Walmesley v. Cooper*, 11 A. & E. 216.

<sup>4</sup> *Wabash Western Ry. v. Brow*, 65 F. 941; — U. S. App. —.

<sup>5</sup> *Aller v. Aller*, 40 N. J. L. 446; H. & W. 62.

<sup>6</sup> *Thornhill v. Neats*, 8 C. B. (N. s.) 831.

<sup>7</sup> *Collyer v. Moulton*, 9 R. I. 90; H. & W. 522; *McCreery v. Day*, 119 N. Y. 1; 23 N. E. 198; W. 360.

charge.<sup>1</sup> On principle, where A. and B. make a bilateral contract, such contract can be discharged by a new contract only where that new contract varies the obligations on both sides. If A.'s obligation alone is increased, while B. remains under the same obligation as before, there is no consideration for A.'s promise to incur the additional obligation; while if A.'s obligation remains the same, and the new agreement simply diminishes B.'s obligation, there is no consideration for A.'s promise to release B. from his pre-existing obligation. The courts are not agreed on this point, however.<sup>2</sup>

Any valid alteration of the terms of the original contract will amount to the substitution of a new contract, and the discharge of the original contract.<sup>3</sup> The new contract will be identical with the old, except so far as the terms have been altered. A written contract may be rescinded by a subsequent oral contract; and this though the original contract is within the Statute of Frauds.<sup>4</sup> But if the new contract is itself within the Statute of Frauds, it must expressly rescind the old.<sup>5</sup> If the second contract is within the Statute of Frauds as well as the first, and is not in substitution for the first, the first contract remains in force.<sup>6</sup> The distinction between the substitution of a new contract for the old, by which the old is entirely discharged, and the substitution of a new mode of performance must be kept carefully in mind. Although the second contract may not be in substitution for the first, the performance of

<sup>1</sup> *Bragg v. Danielson*, 141 Mass. 195; 4 N. E. 622.

<sup>2</sup> *Ante*, pp. 70-74.

<sup>3</sup> *Taylor v. Hilary*, 1 C. M. & R. 741; W. 297.

<sup>4</sup> *Goss v. Lord Nugent*, 5 B. & Ad. 65; *Cummings v. Arnold*, 3 Met. 486.

<sup>5</sup> *Noble v. Ward*, L. R. 2 Ex. 135; *Moore v. Campbell*, 10 Ex. 323.

<sup>6</sup> *Moore v. Campbell*, *supra*; *Whittier v. Dana*, 10 Allen, 326.

the second contract may be accepted as a substituted performance of the first, and so discharge the first contract. In that case, however, it is not the second contract, but the performance of it, which discharges the original contract.<sup>1</sup>

The rule of the common law is *unumquodque ligamen dissolvitur eodem ligamine quo ligatur*,—every obligation must be dissolved in the same manner in which it is created. This rule rested on the rules of procedure by which evidence was classified, and records, deeds, and parol contracts ranked in the order named. In no case at common law could a contract under seal be modified or discharged before breach by a contract not under seal.<sup>2</sup> In equity different rules prevailed, and a contract under seal could be modified or discharged by a subsequent parol agreement.<sup>3</sup> And even at common law, a new contract not under seal was binding, though it did not discharge the original contract.<sup>4</sup> The equitable rule now prevails in England,<sup>5</sup> and in many of the United States by statute;<sup>6</sup> while in other jurisdictions the common-law courts have adopted it of their own accord.<sup>7</sup> The code of civil procedure adopted in many of the States is responsible for the introduction of many equitable rules into the common law.

(e) *Breach of Contract.*

In a bilateral contract the obligation of one party may be discharged by a breach of contract by the other

<sup>1</sup> *Rogers v. Rogers*, 139 Mass. 440; 1 N. E. 122; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140.

<sup>2</sup> *Spence v. Healey*, 8 Ex. 668.

<sup>3</sup> *Very v. Levy*, 13 How. 345, 357; *Canal Co. v. Ray*, 101 U. S. 522.

<sup>4</sup> *Nash v. Armstrong*, 10 C. B. (n. s.) 259.

<sup>5</sup> *Steeds v. Steeds*, 22 Q. B. D. 537; W. 352.

<sup>6</sup> *McCreery v. Day*, 119 N. Y. 1; 23 N. E. 198; W. 360.

<sup>7</sup> *Hastings v. Lovejoy*, 140 Mass. 261; 2 N. E. 776.

party.<sup>1</sup> In order that the breach of contract should operate as a discharge, the breach must go to the essence of the contract.<sup>2</sup> What is or is not of the essence of the contract is a matter of construction which has been already discussed.<sup>3</sup> The breach of contract going to the essence operates as an external condition subsequent; that is to say, the law treats such breach as a condition subsequent, entitling the other party to be discharged from his obligation. The breach does not, however, operate to discharge the contract unless the injured party elects to treat it as a discharge; and therefore until he treats the contract as discharged it remains in force. The right to treat the breach as a discharge may, of course, be waived.<sup>4</sup>

There is a great deal of confusion in the cases as to the nature of conditions, as already pointed out in the chapter on Conditions. In every bilateral contract if there are two promises, X. and Y., and promise Y. is dependent on promise X., performance of X. is an internal condition precedent to the obligation of Y. But where X. and Y. are independent, performance of X. cannot be a condition precedent to the obligation of Y. In such case, however, if X. goes to the essence of the contract, breach of X. is an external condition subsequent, entitling the injured party to a discharge from promise Y. This distinction between the internal condition precedent and the external condition subsequent is fundamental, and the failure to appreciate it has been the cause of much confusion in the decisions of courts and the opinions of text-writers.<sup>5</sup>

<sup>1</sup> *Norrington v. Wright*, 115 U. S. 188; 6 S. Ct. 12; W. 593; H. & W. 584.

<sup>2</sup> *Mersey Co. v. Naylor*, 9 A. C. 434; W. 586.

<sup>3</sup> *Ante*, pp. 174-188.

<sup>4</sup> *Cahen v. Platt*, 69 N. Y. 348; W. 608; *Langdell, Summary*, § 177.

<sup>5</sup> See *ante*, pp. 165, 166.

*(f) Repudiation.*

The absolute and unqualified refusal of one of the parties to a bilateral contract to perform the contract entitles the other party to treat such a refusal as a discharge. Such renunciation or repudiation is, like a breach of contract going to the essence, an external condition subsequent. There is this difference between an actual breach, however, and a repudiation of the contract, that the former will operate as a discharge only when it goes to the essence of the contract;<sup>1</sup> while the latter will operate as a discharge in every case.<sup>2</sup> If, however, the contract is only partly bilateral, repudiation will not operate as a discharge unless an actual breach would so operate. Thus where A. leases land to B., and the lease contains various stipulations, a refusal by A. to perform a particular stipulation will entitle B. to a discharge from his obligations only in the case where an actual breach would entitle him to such discharge. Now an actual breach of a stipulation by A. can discharge B. only where B.'s promise is dependent on A.'s, or where B. is entitled to throw up his lease on account of such breach. If, therefore, there is no dependency between the two promises, and the actual breach by A. of a given promise would not entitle B. to throw up the lease, A.'s refusal to perform cannot operate to discharge B. from his obligations under the lease.<sup>3</sup>

To constitute repudiation there must be either an act

<sup>1</sup> *Mersey Co. v. Naylor*, 9 A. C. 434; W. 586; *contra*, *Wharton v. Winch*, 140 N. Y. 287; 35 N. E. 589.

<sup>2</sup> *Ibid.*; *Rugg v. Moore*, 110 Pa. St. 236; 1 A. 320; W. 603; *Withers v. Reynolds*, 2 B. & Ad. 882; L. 740; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471; 33 N. E. 561; *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84; 37 N. E. 676; *Bradley v. King*, 44 Ill. 339.

<sup>3</sup> *Johnstone v. Milling*, 16 Q. B. D. 460; W. 391.



rendering performance impossible,<sup>1</sup> or an absolute refusal to perform.<sup>2</sup> An announcement of "entire inability" to perform has been held sufficient.<sup>3</sup> If an act is done rendering performance impossible, this is a repudiation of the contract, although the promisor might be able by some subsequent act to undo the consequences of the first act. Thus if a man promises to marry a woman at a certain time and marries another before that time, this is a repudiation of the contract, although the death of his wife might enable him to perform his promise at the specified date.<sup>4</sup> So if one promises to sell property, and before the time appointed for its conveyance sells it to another, this is a repudiation of the contract.<sup>5</sup>

Repudiation, like breach of contract, does not put an end to the contract, but only entitles the injured party to put an end to the contract.<sup>6</sup> The renunciation may therefore be withdrawn at any time before it is accepted

<sup>1</sup> *Short v. Stone*, 8 Q. B. 358; L. 921; *Caines v. Smith*, 15 M. & W. 189; L. 926; *Ford v. Tiley*, 6 B. & C. 325; *Woodberry v. Warner*, 53 Ark. 488; 14 S. W. 67; H. & W. 574; *James v. Burchell*, 82 N. Y. 108; W. 609; *Delamater v. Miller*, 1 Cow. 75; H. & W. 561.

<sup>2</sup> *Hochster v. De la Tour*, 2 E. & B. 678; W. 377; *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84; 37 N. E. 676; *Bradley v. King*, 44 Ill. 339; *Dingley v. Oler*, 117 U. S. 490; 6 S. Ct. 850; W. 399; H. & W. 556; *Johnstone v. Milling*, 16 Q. B. D. 460; W. 391; *Burtis v. Thompson*, 42 N. Y. 246; W. 419; *Frost v. Knight*, L. R. 7 Ex. 111; W. 386.

<sup>3</sup> *Chamber of Commerce v. Sollitt*, 43 Ill. 519.

<sup>4</sup> *Short v. Stone*, *supra*; *Caines v. Smith*, *supra*.

<sup>5</sup> *Delamater v. Miller*, *supra*; *James v. Burchell*, *supra*; *Ford v. Tiley*, *supra*; *Woodberry v. Warner*, *supra*; *Synge v. Synge* (1894), 1 Q. B. 466; *contra*, on the ground that the vendor may repurchase before the time set for the conveyance, *Webb v. Stephenson*, 11 Wash. 342; 39 P. 952; *Garberino v. Roberts*, 41 P. 857; — Cal. —.

<sup>6</sup> *Avery v. Bowden*, 5 E. & B. 714; *Dingley v. Oler*, *supra*; *Johnstone v. Milling*, *supra*; *Zuck v. McClure*, 95 Pa. St. 541; W. 422; *Kadish v. Young*, 108 Ill. 170; W. 431; *Roebbing's Sons v. Lock Stitch Fence Co.*, 130 Ill. 660; 22 N. E. 518; *Ripley v. M'Clure*, 4 Ex. 345; L. 927; *Brown v. Muller*, L. R. 7 Ex. 319.

by the other party;<sup>1</sup> and the party repudiating may take advantage of any event which happens before such acceptance which would entitle him to a discharge from the contract.<sup>2</sup>

(g) "*Failure of Consideration.*"

A contract may be discharged in certain cases by the breach of another contract. In the case of a bilateral contract, as we have seen, there are two ways in which a breach of contract by one party may affect the obligation of the other. B.'s promise Y. may be dependent on A.'s promise X., in which case unless X. is performed, B. is not bound to perform Y.; or X. and Y. may be independent, in which case a breach of X. will discharge Y. if X. goes to the essence of the contract. Dependency can exist only in a bilateral contract, although the courts, by a process miscalled construction, often attempt to make one bilateral contract out of two unilateral contracts.<sup>3</sup> And the rule that a breach of contract by one party may discharge the other, applies, as we have seen, only to bilateral contracts. Nevertheless, a doctrine has sprung up in this country, and is very generally approved, to the effect that "failure of consideration" will discharge a contract. Strictly speaking, there can be no such thing as a "failure of consideration." Either the promisor receives the consideration he has bargained for, or he does not. If he does not receive the consideration, there is no contract; if he does receive the consideration, there can be no "failure" of consideration thereafter. The term "failure of consideration" is used, however, to

<sup>1</sup> Rayburn v. Comstock, 80 Mich. 448; 45 N. W. 378; W. 426; Frost v. Knight, L. R. 7 Ex. 111; W. 386.

<sup>2</sup> Frost v. Knight, *supra*; Avery v. Bowden, *supra*.

<sup>3</sup> *Ante*, pp. 171, 172.

express the situation that arises first, where there is a unilateral contract with an internal condition subsequent which is broken; and second, where the consideration for one promise is another promise, and the second promise is broken. If, for example, in a contract of sale, the thing sold fails to correspond with the description in the contract of sale under such circumstances that the vendee has a right to return the property received, the sale gives rise to a unilateral contract by the vendee to pay the price, which contract is subject to an internal condition subsequent whereby the vendee may return the property and be discharged from his obligation. The term "failure of consideration" is often applied to the failure of the property sold to answer the description. The important question in such cases is, what was the contract of sale? For example, A. agrees to sell B. a certain chose in action; is the agreement a contract for the sale of a valid right or claim, or is it simply a contract that A. shall assign whatever right he may have? This is a question of fact in each case.<sup>1</sup> If the agreement is to assign a valid claim, and the claim proves invalid, the assignee is entitled, by virtue of an internal condition subsequent, to be discharged from his obligation to pay the price; but if the contract simply calls for the assignment by A. of whatever right he possesses, it is clear there is no ground on which B. can escape payment. So in the case of the sale of land, the question is, does the purchaser agree to pay for a deed from his vendor, or for a good title to the land? While the contract is executory it is bilateral, and the purchaser is not bound to accept a defective title; but if he does accept a conveyance with covenants by the vendor, does a failure of title enable him to escape payment of the purchase-money? It is held in England and by some courts

<sup>1</sup> *Lambert v. Heath*, 15 M. & W. 486; *Otis v. Cullum*, 92 U. S. 447.

in this country that such failure of title does not affect the purchaser's obligation to pay the purchase-money;<sup>1</sup> but other American courts take a different view.<sup>2</sup>

The term "failure of consideration" is also used, in cases where one unilateral contract is made in consideration of another unilateral contract, and the second contract is broken. Such failure of consideration is no defence at common law, the two unilateral contracts being entirely independent.<sup>3</sup> The common-law rule still prevails in the Federal courts;<sup>4</sup> but in many of the State courts a breach of one unilateral contract may operate to discharge the obligation of a second contract for which the first is the consideration. The courts often attempt to justify this result by saying that the two unilateral contracts are to be construed as one bilateral contract, and that the doctrines governing dependency therefore apply. Dependency, in the proper sense, however, is purely a matter of construction; while to make one bilateral contract out of two unilateral contracts is not construction at all. Where promise X. and promise Y. are contained in one bilateral contract, the dependency of promise Y. on promise X. is caused by the fact that the performance of X. is construed as an internal condition precedent to the obligation of Y.; but where X. and Y. are contained respectively in two separate unilateral contracts, a breach of X. can only operate as an external condition subsequent affecting Y.

In the case of a specialty, inasmuch as consideration is not an essential element of the contract, failure of consideration is no defence at common law.<sup>5</sup> In the

<sup>1</sup> *Soper v. Arnold*, 14 A. C. 429; *Lloyd v. Jewell*, 1 Greenl. 352.

<sup>2</sup> *Rice v. Goddard*, 14 Pick. 293; *Redding v. Lamb*, 81 Mich. 318; 45 N. W. 997.

<sup>3</sup> Ames, 9 Harvard Law Rev. 52.

<sup>4</sup> *Hartshorn v. Day*, 19 How. 211, 222.

<sup>5</sup> *Ibid.*

case of a negotiable instrument, however, consideration is essential to the validity of the instrument. If, then, there has been what is sometimes called a "total failure of consideration," that is, if the maker of the instrument has actually received nothing of value, the instrument is not binding because there is no consideration for it. If, however, the consideration for the instrument is a promise, the breach of such promise cannot, at common law, affect the validity of the instrument; for the consideration is not the performance, but the promise.<sup>1</sup> These principles, as just stated, are not generally followed in our State courts.<sup>2</sup> Partial failure of consideration, such as arises, for example, from a breach of warranty in a contract of sale, is no defence at common law;<sup>3</sup> but the modern practice is generally to admit such failure of consideration as a defence in order to avoid circuity of action.<sup>4</sup>

(h) *Alteration or Loss of a Written Instrument.*

The intentional alteration of a written contract by one of the parties to the contract in a material particular without the consent of the other party discharges the obligation of the other party. The alteration must be intentional; if made by accident or mistake it is of no consequence.<sup>5</sup> But though a mistake in making the alteration renders the alteration immaterial, if the mistake is as to the legal consequences of the alteration, the

<sup>1</sup> *Moggridge v. Jones*, 14 East, 486; L. 638; *Spiller v. Westlake*, 2 B. & Ad. 155; L. 654; *Trickey v. Lane*, 6 M. & W. 278.

<sup>2</sup> *Duncan v. Charles*, 5 Ill. 561; *Hunt v. Livermore*, 5 Pick. 395; L. 757; *Ft. Payne Coal Co. v. Webster*, 163 Mass. 134; 39 N. E. 786; *Edwards v. Pyle*, 23 Ill. 354.

<sup>3</sup> *Thornton v. Wynn*, 12 Wheat. 183.

<sup>4</sup> *Withers v. Greene*, 9 How. 213.

<sup>5</sup> *Wilkinson v. Johnson*, 3 B. & C. 428; *Neff v. Horner*, 63 Pa. St. 327.

alteration is treated as intentional, and discharges the contract.<sup>1</sup> The alteration must be material; that is, it must alter the legal effect of the instrument upon the rights or remedies of the parties.<sup>2</sup> If the alteration is with the consent of the other party, the contract is not discharged;<sup>3</sup> and consent to the alteration may be given after, as well as before the alteration has been made.<sup>4</sup> It is the *alteration* of the instrument that discharges the contract; whether the alteration injures or benefits the other party is immaterial.<sup>5</sup> The alteration which destroys the instrument does not discharge a debt which exists independent of the instrument,<sup>6</sup> unless such alteration is made fraudulently.<sup>7</sup> In England the alteration of an instrument by a stranger while in the possession of one of the parties, though without his knowledge, destroys the obligation of the other party;<sup>8</sup> but in this country such alteration has no effect.<sup>9</sup>

The loss of a negotiable instrument at common law destroyed the rights of the owner;<sup>10</sup> but equity would compel the payment of the note if the owner offered proper indemnity,<sup>11</sup> and the equitable doctrine has sometimes been applied in this country by courts of law.<sup>12</sup>

<sup>1</sup> *Bank of Hindostan v. Smith*, 36 L. J. C. P. 241; *Kelly v. Trumble*, 74 Ill. 428.

<sup>2</sup> *Gordon v. Third Nat. Bank*, 144 U. S. 97; 12 S. Ct. 657.

<sup>3</sup> *Speake v. United States*, 9 Cranch, 28.

<sup>4</sup> *Stiles v. Probst*, 69 Ill. 382.

<sup>5</sup> *Martin v. Thomas*, 24 How. 315; *Reese v. United States*, 9 Wall. 13.

<sup>6</sup> *Clough v. Seay*, 49 Ia. 111; H. & W. 665.

<sup>7</sup> *Smith v. Mace*, 44 N. H. 553; H. & W. 660.

<sup>8</sup> *Davidson v. Cooper*, 13 M. & W. 343.

<sup>9</sup> *Church v. Fowle*, 142 Mass. 12; 6 N. E. 764; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498; 5 N. E. 338; *Condict v. Flower*, 106 Ill. 105.

<sup>10</sup> *Hansard v. Robinson*, 7 B. & C. 90.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Daniel*, *Negotiable Instruments*, II. § 1478.

(i) *Merger and Estoppel.*

When a given obligation exists, and by act of the parties or of the law that obligation becomes established by a higher form of evidence, the original obligation is merged in the obligation of higher order. The three classes of evidence, it will be remembered, are parol evidence, deeds, and records. If, then, a simple contract exists, and a new contract is made identical with the old as to parties,<sup>1</sup> and subject matter,<sup>2</sup> but under seal, the simple contract is merged in the specialty, and thereby discharged. The simple acknowledgment of a simple contract debt by a deed merges the simple contract in the specialty;<sup>3</sup> but if the purpose of the deed is to provide for settling a dispute as to the amount of the debt, there is no merger.<sup>4</sup> Nor does merger take place if the new contract is conditional, so long as the condition is unperformed.<sup>5</sup> Nor is there any merger where the new contract is taken as a collateral security for the old.<sup>6</sup>

There can be no merger of an oral in a written contract, because oral and written contracts are of equal rank. The written contract, however, may be a substitute for a preceding oral contract. The difference between substitution and merger is this: that the question whether a new contract is substituted for an old one is a question of fact, depending upon the intention of the parties; while the question of merger is one of law, since merger takes place without regard to the intention of the parties. The term merger is often

<sup>1</sup> *White v. Cuyler*, 6 T. R. 176; *Banorgue v. Hovey*, 5 Mass. 11.

<sup>2</sup> *Walton v. United States*, 9 Wheat. 651.

<sup>3</sup> *Isaacson v. Harwood*, L. R. 3 Ch. 225.

<sup>4</sup> *Bank of Columbia v. Patterson*, 7 Cranch, 299.

<sup>5</sup> *Baits v. Peters*, 9 Wheat. 556.

<sup>6</sup> *Day v. Leal*, 14 Johns. 404.

used, however, to denote the fact that an oral agreement has been reduced to writing.

The judgment of a court of competent jurisdiction discharges the obligation which the action is brought to enforce. The judgment may operate either to merge the original obligation, in so far as judgment is rendered for the plaintiff; or to estop the plaintiff from subsequently setting up his original claim, in so far as judgment is rendered for the defendant. The effect of a record, as we have seen, is to furnish conclusive evidence of the matters therein contained as between the parties to the record.

**§ 5. Discharge of Right of Action for Breach of Contract.**

The right of action arising from breach of contract may be discharged by an internal or by an external condition subsequent.

*(a) Internal Conditions Subsequent.*

The right of action is discharged by an internal condition subsequent whenever an event happens which the contract provides shall bar the action. Thus in insurance policies there is often a provision that the right of action shall be barred if a claim is not filed within a certain time after a loss occurs.

*(b) External Conditions Subsequent.*

The right of action may be barred by an external condition subsequent whenever an event happens which the law regards as putting an end to that right. The various external conditions subsequent recognized by the law are waiver, gift, release, the alteration or loss of a written instrument, merger, estoppel, accord and satisfaction, arbitration and award, and certain statutory



discharges. The rules governing waiver, gift, release, the alteration and loss of a written instrument, merger and estoppel have already been explained.

(1) ACCORD AND SATISFACTION. — A breach of contract gives the injured party a right to sue and obtain a judgment for damages. An agreement to accept something in lieu of the damages to be awarded by the judgment of the court is called an accord; the actual acceptance of the thing agreed upon constitutes satisfaction. An accord without satisfaction does not discharge the right of action.<sup>1</sup> But though an accord will not discharge a right of action, the acceptance of a new contract in satisfaction of the right arising from breach of the original contract will operate as a discharge.<sup>2</sup> It is a question of fact in every case whether what is given by the defendant is accepted as satisfaction by the plaintiff. Whether the plaintiff has a right to apply a check sent in full satisfaction of the debt in part payment thereof is a question on which the authorities are not agreed. It is held in England<sup>3</sup> and Massachusetts<sup>4</sup> that he has that right, while in New York<sup>5</sup> and Iowa<sup>6</sup> the acceptance of the check is held to operate as a satisfaction. In the case of a composition with creditors, they may agree to accept the composition agreement itself as a satisfaction,<sup>7</sup> or they may agree

<sup>1</sup> *Allen v. Harris*, 1 Ld. Raym. 122; W. 320; *Memphis v. Brown*, 20 Wall. 289; *Kromer v. Heim*, 75 N. Y. 574; W. 357; H. & W. 627; *Hosler v. Hursh*, 151 Pa. St. 415; 25 A. 52; W. 359, note 1.

<sup>2</sup> *Babcock v. Hawkins*, 23 Vt. 561; W. 365; *Evans v. Powis*, 1 Ex. 601; *Morehouse v. Second Nat. Bank*, 98 N. Y. 503; *Flegal v. Hoover*, 156 Pa. St. 276; 27 A. 162.

<sup>3</sup> *Day v. McLea*, 22 Q. B. D. 610; W. 355.

<sup>4</sup> *Tompkins v. Hill*, 145 Mass. 379; 14 N. E. 177.

<sup>5</sup> *Fuller v. Kemp*, 138 N. Y. 231.

<sup>6</sup> *Keck v. Hotel Owners' Ins. Co.*, 89 Ia. 200; 56 N. W. 438.

<sup>7</sup> *Good v. Cheesman*, 2 B. & Ad. 328; W. 320.

to accept only the actual payment of the composition.<sup>1</sup> The satisfaction must be furnished in every case by the party liable, or by some one in his behalf.<sup>2</sup>

The rule of the common law previously mentioned, *unumquodque ligamen dissolvitur eodem ligamine quo ligatur*, required that where the cause of action was established by a deed, as in the case of a single bond, or of a covenant to pay an existing debt, no release or satisfaction of that cause of action could be proved except by means of a deed.<sup>3</sup> But where the deed did not show that an obligation existed at the time of its execution, an accord and satisfaction in discharge of the obligation sued on could be shown by parol.<sup>4</sup> Thus in the case of a covenant to do a certain act, as to repair a house, though the obligation to repair is created by the deed, the cause of action arises from the failure of the defendant to repair, and not from the deed itself; so that in an action on such a covenant accord and satisfaction was a good defence.<sup>4</sup> Equity, however, recognized accord and satisfaction as a defence, though the cause of action sprang from the deed itself, and the rules of equity have in many jurisdictions superseded those of the common law.

(2) ARBITRATION AND AWARD. — If the parties to a contract submit a dispute to arbitration, the award of the arbitrators is binding upon them. The award must be certain,<sup>5</sup> and must conform to the terms of the submission.<sup>6</sup> When an award determines simply the

<sup>1</sup> *Re Hatton*, L. R., 7 C. A. 723; W. 333; *Clarke v. White*, 12 Pet. 178.

<sup>2</sup> *James v. Isaacs*, 12 C. B. 791; W. 330.

<sup>3</sup> *Blake's Case*, 6 Co. 43 b; W. 317.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Lyle v. Rodgers*, 5 Wheat. 394.

<sup>6</sup> *McCormick v. Gray*, 13 How. 26; *De Groot v. United States*,

amount of an existing debt, the original cause of action is not discharged, but the amount of the debt is conclusively determined by the award; but where the award creates a new duty, as where a claim for unliquidated damages is submitted to arbitration and a fixed sum awarded, the original cause of action is discharged.<sup>1</sup> A submission to arbitration is a power which may be revoked at any time before the publication of the award.<sup>2</sup> Equity has jurisdiction to set aside an award for mistake so gross as to imply bad faith or failure to exercise an honest judgment; but not for mistake in general.<sup>3</sup>

(3) STATUTORY DISCHARGES. — Lapse of time does not discharge a right of action, though laches may deprive a party of the assistance of a court of equity to enforce his rights. In all jurisdictions, however, there are statutes limiting the time within which actions may be brought.

A discharge in bankruptcy is a common statutory form of discharge, which is personal to the debtor. There is at present no National Bankrupt Act in this country, and the interference of the States with the obligation of contracts is limited by the United States Constitution.

5 Wall. 419; *Boston & Lowell R. R. v. Nashua, &c. R. R.*, 139 Mass. 463; 31 N. E. 751; W. 372.

<sup>1</sup> *Freeman v. Bernard*, 1 Ld. Raym. 247; W. 367; *Commings v. Heard*, L. R., 4 Q. B. 669; W. 369.

<sup>2</sup> *Boston & Lowell R. R. v. Nashua, &c. R. R.*, *supra*.

<sup>3</sup> *Burchell v. Marsh*, 17 How. 344; *Bispham v. Price*, 15 How. 162.

## CHAPTER XI.

## THE ENFORCEMENT OF CONTRACT.

## § 1. Sanctions.

Legal obligations are enforced by means of sanctions and remedies. The sanction is imposed for the purpose of compelling the fulfilment of the obligation; while the remedy is given for the purpose of redressing the wrong done by the violation of the obligation. Sanctions are of two kinds, intermediate and ultimate. Sanctions which consist merely in liability to a duty are called intermediate sanctions; sanctions which consist not of liability to a duty, but of liability to some other evil are called ultimate sanctions.<sup>1</sup> Ultimate sanctions comprise bodily pain, including death, imprisonment, and forfeiture.<sup>2</sup> The last two sanctions only apply to contractual obligation. In the enforcement of contracts there may be one or more intermediate sanctions. Thus if A. promises to convey land to B., and breaks his contract, the breach of the primary obligation to convey the land gives rise to a secondary or sanctioning obligation to pay damages.<sup>3</sup> If an action is brought for the damages, and judgment obtained against B., the judgment gives rise to another intermediate sanction; to wit, the duty to pay the judgment. If the judgment is not paid, it is enforced by one of two ultimate sanctions,

<sup>1</sup> Markby, *Elements of Law*, § 840.

<sup>2</sup> *Ibid.*, § 841.

<sup>3</sup> *Ibid.*, §§ 183, 184.

imprisonment or forfeiture. Imprisonment as an ultimate sanction for the non-payment of a debt has become very rare, though it was formerly very common. Forfeiture, or the seizure and sale of the debtor's property in execution, is the ordinary ultimate sanction in such cases. If, in the case put, instead of an action for damages, a suit is brought for specific performance, the decree of the court awarding specific performance gives rise to an intermediate sanction, and if the decree is violated it may be enforced by the ultimate sanctions of imprisonment for contempt, and of forfeiture, in accordance with the practice of courts of equity.

In looking at the sanctions of contractual obligation we are looking at the matter from the standpoint of the promisor; but the more common and more important question is the question of remedies, which must be looked at from the standpoint of the promisee.

## § 2. Remedies.

Remedies are of two kinds; those which are intended to prevent, and those which are intended to redress a breach of obligation.<sup>1</sup> A threatened breach of contract may be prevented in certain cases by injunction. Injunction is an equitable remedy, and will therefore only be granted when adequate redress for the threatened injury could not be obtained by the ordinary remedy at law. Thus it has been held that a singer who contracts to sing at a particular theatre exclusively may be prevented by injunction from singing elsewhere during the term of her engagement.<sup>2</sup>

The remedies for the redress of a breach of contract are of two kinds: an action for damages, and an action

<sup>1</sup> Holland, Jurisprudence, 281.

<sup>2</sup> *Lumley v. Wagner*, 1 D. M. & G. 604; *contra*, *Rice v. D'Arville*, 162 Mass. 559; 39 N. E. 180 (*semble*).

for specific performance. The former remedy is legal; the latter equitable in character. Before considering the character of these remedies we must first examine once more the nature of contractual obligation.

A man may incur contractual obligation with reference to a past, present, or future event. If he contracts that something is, or has been, what is the nature of his obligation? Clearly, in such a case, he simply assumes a risk and binds himself to pay to the other party a sum of money sufficient to compensate the latter for the non-fulfilment of the assurance. In such a case the contract is broken, if at all, as soon as it is made, and the primary obligation necessarily coincides with the secondary or sanctioning obligation to pay damages. If the contract provides that something shall happen in the future, the promised event may or may not be within the control of the promisor. If the event is not within his control, his promise can amount only to the assumption of a risk, as in the preceding case. In this case also the primary obligation to compensate the other party for the non-occurrence of the promised event is also necessarily coincident with the secondary or sanctioning obligation to pay damages for breach of contract. If, however, the promised event is one which in its nature is within the control of the promisor, a different situation arises. Here the primary obligation of the promisor is to perform his promise; and his failure to perform gives rise to a secondary obligation to pay damages. In every contract, therefore, there is the assumption of a risk; and every breach of contract gives rise to a secondary obligation to pay damages; but in contracts where the thing promised is within the control of the promisor there is, in addition, a distinct primary obligation to perform the contract; while in other contracts the primary obligation is necessarily

coincident with the secondary obligation. Mr. Justice Holmes maintains<sup>1</sup> that the true view of contract is that a man who makes a contract incurs an obligation to respond in damages for the non-fulfilment of the contract, which obligation is defeasible by performance. That this is true in all cases where the thing promised is not within the control of the promisor is clear. That there is no primary obligation to perform a contract when performance is within the control of the promisor is a doctrine open to the following objections. First, the doctrine seems to rest only on the limitations of procedure in the king's courts, and not on any true historical theory of contract.<sup>2</sup> Second, the doctrine is entirely opposed to all equitable ideas; and the whole tendency of our modern law is in the direction of equitable theories.<sup>3</sup> Third, the doctrine involves an unreasonable departure by the law from fundamental ethical principles.

In addition to the secondary obligation to pay damages for breach of contract, which exists in all cases, and the primary obligation to perform the contract when it is within the promisor's power to do so, there is another obligation resulting from certain contracts which is generally recognized. This is the obligation which exists before the time for performance has arrived, not to violate the right of the promisee to have the contract kept open as a subsisting and effective contract. A

<sup>1</sup> Common Law, 298-303.

<sup>2</sup> "The oldest actions of the common law aim for the most part not at 'damages,' but at what we call 'specific relief.' . . . Even when the cause of action is in our eyes a contractual obligation, the law tries its best to give specific relief. . . . The common law has excellent intentions; what impedes it is an old-fashioned dislike to extreme measures." Pollock & Maitland, *History English Law*, II. 593, 594.

<sup>3</sup> *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578; 15 S. W. 844; *H. & W. 181*; *King v. Duluth, M. & N. Ry. Co.*, 63 N. W. 1105; — Minn. —.

violation of this right of the promisee constitutes what is known as an "anticipatory breach" of contract. An anticipatory breach of contract may occur in one of two ways. The promisor may absolutely repudiate the contract;<sup>1</sup> or he may do some act putting it out of his power to fulfil the contract.<sup>2</sup> In general the rules governing the right of action for an anticipatory breach of contract are similar to those governing the right of one party to treat the repudiation of the other party as a discharge. That is to say, the act relied upon as constituting an anticipatory breach must be of such a character as to justify the injured party in putting an end to the contract, and must be treated by him as discharging the contract except so far as his own right of action for damages is concerned. Most of the cases sustaining the right of the injured party to treat the other party's repudiation of the contract as a discharge also support the doctrine of anticipatory breach.

The limitations of the right of the promisee to have the contract kept open as a subsisting and effective contract until the time for performance arrives are not absolutely defined. It seems clear, however, that a refusal to pay a debt cannot give a right of action before the maturity of the debt. In Massachusetts the general doctrine of anticipatory breach is repudiated,<sup>3</sup> although the court does not deny the possibility that in certain contracts present obligations may arise, though the time for performance is in the future; as for example, in the case of an engagement to marry. The Massachusetts

<sup>1</sup> *Hochster v. De la Tour*, 2 E. & B. 678; W. 377; *Frost v. Knight*, L. R. 7 Ex. 111; W. 386; and see *ante*, pp. 287 *et seq.*

<sup>2</sup> *Short v. Stone*, 8 Q. B. 358; L. 921; *Caines v. Smith*, 15 M. & W. 189; L. 926; *Delamater v. Miller*, 1 Cow. 75; H. & W. 561. As to what amounts to repudiation, see *ante*, pp. 287 *et seq.*

<sup>3</sup> *Daniels v. Newton*, 114 Mass. 530; W. 406.



courts, however, are not logically consistent; for although they refuse to allow a man to recover damages for a refusal to perform a contract before the time for performance has arrived, they permit him, after the time for part performance has arrived, to treat a refusal to perform as a breach of the entire contract, and to recover damages for not performing the contract in the future.<sup>1</sup>

Where there is an actual breach of contract the injured party is bound to use reasonable efforts to prevent unnecessary loss;<sup>2</sup> but where there is an anticipatory breach no such duty arises, for such anticipatory breach can only be regarded as a breach in case the injured party wishes so to treat it.<sup>3</sup>

In computing damages the following general principles are to be observed. The object of damages for breach of contract is to compensate the injured party for the loss actually sustained; except in the case of breach of promise of marriage, where in an action for breach of contract damages are awarded as if for a tort.<sup>4</sup>

The extent of contractual obligation is fixed by the act giving rise to the obligation; hence only such damages for breach of contract will be allowed as a reasonable man would suppose the contract was intended to provide for.<sup>5</sup>

<sup>1</sup> *Parker v. Russell*, 133 Mass. 74; W. 414.

<sup>2</sup> *Leake*, Contracts, 906; *Clark v. Marsiglia*, 1 Denio, 317; W. 417; H. & W. 572; *Derby v. Johnson*, 21 Vt. 17; H. & W. 568; *Mather v. Butler County*, 28 Ia. 253; H. & W. 612. As to contracts of employment, see *Huffcut, Agency*, 74.

<sup>3</sup> *Kadish v. Young*, 108 Ill. 170; W. 431; *Roebbling's Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660; 22 N. E. 518; *Phillipotts v. Evans*, 5 M. & W. 475.

<sup>4</sup> *Anson*, Contracts (8th ed.), 253.

<sup>5</sup> *Hadley v. Baxendale*, 9 Ex. 341.

In the case of a unilateral contract, the damages are measured by the difference between the performance called for and that actually rendered. In the case of a bilateral contract, there are two elements to be estimated in computing the damages: first, the actual expense incurred by the injured party, and the actual value of his services; and second, the loss of anticipated profits.<sup>1</sup>

Interest is not recoverable at common law as damages for the detention of money due unless the contract so provides, or unless there is an implied contract to pay such interest by reason of the usage of trade, as in the case of mercantile instruments.<sup>2</sup> In this country, however, interest is generally recoverable on liquidated claims, that is, where the amount of the claim is fixed.<sup>3</sup>

The parties to a contract may agree upon the damages to be paid in case of a breach. Whether the specification in the contract of a fixed sum to be paid for a breach makes that sum liquidated damages or a penalty is a question of construction which has been already discussed.<sup>4</sup>

When the performance of his contract is within the control of the promisor, his primary obligation is to perform his contract. This is the equitable view of contractual obligation. This also was the view of contractual obligation taken in the common-law courts in early times.<sup>5</sup> The common-law courts, however, in

<sup>1</sup> *United States v. Behan*, 110 U. S. 338; 4 S. Ct. 81.

<sup>2</sup> *Page v. Newman*, 9 B. & C. 378; *London, Chatham, & Dover Ry. Co. v. South-Eastern Ry. Co.* (1893), A. C. 429; *Madison County v. Bartlett*, 1 Scam. 67.

<sup>3</sup> *Young v. Godbe*, 15 Wall. 562; *Curtis v. Innerarity*, 6 How. 146; *Cooper v. Coates*, 21 Wall. 105.

<sup>4</sup> *Ante*, Ch. V. § 5.

<sup>5</sup> *Ante*, p. 302, n. 2.

administering justice, came to award damages only for breach of contract; and this limitation on their power of enforcing obligations seems to have given rise to the idea that because a common-law court could give only damages for breach of contract, the contract amounted only to the assumption of a risk; and the promisor had the right to break the contract if he chose. This view of contract has been adopted in many cases,<sup>1</sup> and has received the support of at least one distinguished jurist.<sup>2</sup> The constant progress of equitable doctrines and equitable ideas, however, seems to render it impossible that a conception of contractual obligation so far below that of ordinary business morality should long continue to receive the sanction of the law.

The equitable theory of contractual obligation is that a man is bound to perform his contracts if he can. This is the primary obligation which equity will enforce, in a proper case, by its peculiar remedies of injunction and specific performance. This primary obligation may exist side by side with a secondary obligation to pay damages. But though this is the equitable theory of contractual obligation, it does not follow that equity will in every case interfere to enforce such primary obligation. On the contrary, the interference of equity must be sought on equitable grounds, namely, that the complainant has not an adequate remedy at law.

If the contract contains only negative stipulations, it can be specifically enforced by injunction. If the contract contains only positive stipulations, a decree for specific performance is necessary. If the contract contains both positive and negative stipulations, the jurisdiction of equity to enforce the negative stipulations by injunction when it cannot enforce the pos-

<sup>1</sup> *Ante*, pp. 70-74.

<sup>2</sup> Holmes, *Common Law*, 298-303.

itive stipulations by a decree for specific performance is disputed.<sup>1</sup>

Whether the contract be negative or positive in its character, equity will only interfere where the damages which the plaintiff could recover at law would be an inadequate remedy. Negative contracts are more readily enforced than positive ones, because a decree for specific performance will only be granted when the court can supervise the performance of the contract. The jurisdiction of equity in the case of positive contracts is chiefly confined to contracts affecting land and certain special kinds of personal property. In decreeing specific performance the court is governed by many principles of equity which cannot be discussed here.<sup>2</sup> The most important thing to notice in a work on Contracts is that consideration is always essential to every contract which equity will enforce; while at law, as we have seen, consideration has nothing to do with the obligation of formal contracts.

<sup>1</sup> See *Lumley v. Wagner*, 1 D. M. & G. 604; *Rice v. D'Arville*, 162 Mass. 559; 39 N. E. 180; *Cort v. Lassard*, 18 Or. 221; 22 P. 1054; H. & W. 619.

<sup>2</sup> The student is referred to Sir Edward Fry's treatise on Specific Performance for further information on this difficult branch of equity jurisdiction.

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## ADDENDUM

Page 41. SEAL. The United States Supreme Court has just decided that a scroll or mark may be a sufficient seal. *Jacksonville, &c. Railway v. Hooper*, 160 U. S. 514.



# INDEX.

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## A.

	Page
<b>ACCEPTANCE.</b> (See also <b>OFFER AND ACCEPTANCE.</b> )	
relation of, to consideration . . . . .	85
in unilateral and bilateral contracts . . . . .	85
communication of . . . . .	86-89
must correspond with offer . . . . .	89-95
distinguished from counter offer . . . . .	92
must not be conditional . . . . .	92
must be made in manner prescribed by offer . . . .	93
must be furnished within the time specified in the offer, or within reasonable time . . . . .	93
as consideration . . . . .	61-64
as essential to validity of deed . . . . .	41-43
of benefits . . . . .	43-45
of documents . . . . .	47-50
by mail . . . . .	94
by telegraph . . . . .	95
barred by previous rejection of offer . . . . .	95
<b>ACCEPTANCE AND RECEIPT,</b> under statute of frauds . . . . .	210-211
<b>ACCORD AND SATISFACTION</b> . . . . .	296-297
<b>ACCOUNT,</b> droitural nature of writ . . . . .	18
action of . . . . .	21
<b>ACTION,</b> condition affecting right of . . . . .	150
<b>ACTIONS EX CONTRACTU.</b> . . . . .	1, 2, 5
droitural nature of . . . . .	18
of debt . . . . .	13, 18
of covenant . . . . .	13, 20

	Page
ADEQUACY OF CONSIDERATION . . . . .	60
ADMINISTRATORS. (See EXECUTORS AND ADMIN- ISTRATORS.)	
AGENCY,	
relation of, to past consideration . . . . .	83
AGENT,	
appointment of, under statute of frauds . . . . .	210
contracts to cause breach of duty by, illegal . . . .	105
AGREEMENT,	
relation of, to contract . . . . .	12
AGREEMENT FOR FUTURE CONTRACT . . . .	52
ALIEN ENEMY,	
trading with . . . . .	106
ALTERATION OF WRITTEN INSTRUMENT,	
as discharge of contract . . . . .	292-293
ALTERNATIVE CONTRACTS,	
construction of . . . . .	174
ANTECEDENT CONSIDERATION,	
in negotiable instruments . . . . .	100
— ANTICIPATORY BREACH . . . . .	302-304
APPOINTMENT TO PUBLIC OFFICE,	
contracts tending to interfere with, are illegal . . .	106
ARBITRATION,	
as condition precedent . . . . .	150
contracts to submit to . . . . .	113
and award . . . . .	297-298
ASSIGNMENT OF CHOSE IN ACTION,	
legality of . . . . .	111
ASSIGNMENT OF EMOLUMENTS OF PUBLIC OFFICE,	
illegal . . . . .	107
ASSIGNMENT OF CONTRACT . . . . .	271-277
at common law . . . . .	271
in equity . . . . .	271-275
by operation of law . . . . .	276-277
of personal contracts . . . . .	272-273
of part of fund . . . . .	273
necessity of notice of . . . . .	274-275
negotiability . . . . .	275-276

	PAGE
<b>ASSIGNMENT OF CONTRACT</b> — <i>continued</i> ,	
by death . . . . .	276
by marriage . . . . .	277
by bankruptcy and insolvency . . . . .	277
by transfer of land . . . . .	277
<b>ASSUMPSIT.</b> (See also <b>INDEBITATUS ASSUMPSIT.</b> )	
origin of . . . . .	23
in action for negligence . . . . .	23
relation of, to deceit . . . . .	23, 80
consideration in . . . . .	54
<b>ASSURANCE.</b> See <b>PROMISE.</b>	
<b>ATTORNEY,</b>	
contracts of, to defend against criminal prosecution . . . . .	113
<b>AUCTIONS</b> . . . . .	46, 47
fraud in . . . . .	104
 <b>B.</b>	
<b>BAIL,</b>	
agreement to indemnify, illegal . . . . .	113
<b>BAILMENT</b> . . . . .	22
as an indefinite recusable obligation . . . . .	7
obligations of, as modified by contract . . . . .	47-50
<b>BAILMENT CONTRACTS,</b>	
consideration in . . . . .	59
impossibility of performance in . . . . .	180-181
<b>BANKRUPTCY,</b>	
assignment of contract by . . . . .	277
consideration for new promise to pay debt discharged	
in . . . . .	81
as discharge of contract . . . . .	298
<b>BENEFICIARY,</b>	
right of, to sue on contract . . . . .	216-228
<b>BENEFIT,</b>	
as consideration . . . . .	54
acceptance of, as constituting promise . . . . .	43-45
<b>BIFACTORAL OBLIGATIONS,</b>	
negotiable instruments as . . . . .	100



	Page
BILATERAL CONTRACTS . . . . .	11
of sale . . . . .	146-147
of insurance . . . . .	147-148
leases . . . . .	148
formed by construction of two unilateral contracts	171-172
acceptance in . . . . .	85
consideration in . . . . .	59
BILLS OF LADING,	
as evidence of contract . . . . .	47-50
BLINDNESS,	
effect of, on execution of written instruments . . . . .	35-38
"BOHEMIAN OATS" CONTRACTS . . . . .	105
BONDS,	
conditions in, subsequent in form and precedent in	
fact . . . . .	150
BREACH OF CONTRACT,	
as discharge . . . . .	285-286
distinguished from dependency of promises . . . . .	286
anticipatory . . . . .	302-304
BUILDING CONTRACTS,	
agreements to pay additional compensation . . . . .	70-74
BUSINESS CIRCULARS AND PROPOSALS . . . . .	45

## C.

CANCELLATION OF DOCUMENTS . . . . .	261
CAPACITY, CONTRACTUAL . . . . .	33
of married women . . . . .	33
of infants . . . . .	33, 231
of lunatics . . . . .	34
of drunkards . . . . .	34
of spendthrifts . . . . .	34
of corporations . . . . .	34
CAUSA,	
relation of, to consideration . . . . .	55
CAVEAT EMPTOR . . . . .	248
CERTAINTY,	
necessity of, in contracts . . . . .	30
instances of . . . . .	31, 32

<b>CERTIFICATE,</b>	
of third party as condition of contract . . . .	166-167
<b>CHAMPERTY.</b> (See MAINTENANCE AND CHAMPERTY.)	
<b>CHARTER.</b> (See DEED; COVENANT; FORMAL CONTRACT; SPECIALTY; CONTRACT UNDER SEAL.)	
<b>CHARTER-PARTIES,</b>	
conditions in . . . . .	145, 148
<b>COHABITATION,</b>	
contracts in consideration of. . . . .	114
<b>COMBINATIONS,</b>	
to limit competition. (See RESTRAINT OF TRADE.)	
<b>COMMON CARRIER.</b> (See also RAILWAYS.)	
modification of liability by contract . . . . .	47-50
is under indefinite recusable obligations . . . . .	7
liability of . . . . .	22
<b>COMMUNICATION OF ACCEPTANCE.</b> . . . .	86-89
<b>COMPETITION,</b>	
contracts to stifle . . . . .	104
(See also RESTRAINT OF TRADE.)	
<b>COMPOSITION WITH CREDITORS,</b>	
as discharge of contract . . . . .	296-297
consideration in . . . . .	77
fraud in . . . . .	103, 104
<b>COMPROMISE,</b>	
as consideration . . . . .	67-70
<b>COMPURGATION</b> . . . . .	16
<b>CONCURRENT CONDITIONS</b> . . . . .	151
(See also CONDITIONS.)	
<b>CONDITIONAL ACCEPTANCE</b> . . . . .	92
<b>CONDITION PRECEDENT,</b>	
arbitration as . . . . .	113, 150
distinction between consideration and . . . . .	59
<b>CONDITIONS</b> . . . . .	141-168
in contract of sale . . . . .	144, 146-147
in charter-parties . . . . .	145, 148
in insurance policies . . . . .	147-148
in leases . . . . .	148
distinguished from representations and warranties . . . . .	149
nature of . . . . .	141

CONDITIONS — *continued*,

classification of . . . . .	142-148
internal and external . . . . .	143, 151, 152
express and implied . . . . .	151
precedent and subsequent . . . . .	142
suspending and discharging obligation . . . . .	149
subsequent in form, precedent in fact . . . . .	150
in bonds . . . . .	150
affecting right of action . . . . .	150
requiring arbitration . . . . .	150
concurrent . . . . .	151
mutual . . . . .	158, 159
in optional contracts . . . . .	157
in instalment contracts for sale of land . . . . .	154-156
mutual dependency . . . . .	158-159
impossible in negotiable instruments . . . . .	159
in cases of inconsistent description . . . . .	160-162
performance of . . . . .	162
waiver of . . . . .	163-167
reasonable performance of . . . . .	166-167
certificate of third party . . . . .	166-167
equitable view of . . . . .	167
satisfaction of promisor . . . . .	183-184

## CONDITIONS SUBSEQUENT,

internal, discharging contract . . . . .	280-281
external, discharging contract . . . . .	281-295
internal, discharging right of action for breach of contract . . . . .	295
external, discharging right of action for breach of contract . . . . .	295-298
as causes for rescission. (See RESCISSION OF CONTRACT.)	

## CONSIDERATION,

as a secondary act in bifactoral contractual obligations . . . . .	10
as part of the contract . . . . .	12
as a benefit to the promisor . . . . .	20
origin of . . . . .	53-56
seal as evidence of . . . . .	53
in debt . . . . .	54
<i>quid pro quo</i> as . . . . .	54
in special assumpsit . . . . .	54
detriment as . . . . .	54

	PAGE
CONSIDERATION — <i>continued</i> ,	
benefit as . . . . .	54
relation of, to deceit . . . . .	54
in indebitatus assumpsit . . . . .	54
antecedent . . . . .	54, 56
subsequent . . . . .	56
past . . . . .	56
relation of, to <i>causa</i> . . . . .	55
good and valuable . . . . .	55
necessity of, in simple contracts . . . . .	55
definition of . . . . .	56
instances of . . . . .	56-58
in equity . . . . .	54, 55
mutual promises . . . . .	58
in bilateral contracts . . . . .	59
executed and executory . . . . .	59
distinction between, and consideration precedent . . . . .	59
in bailment contracts, . . . . .	59
delivery of possession as . . . . .	59
adequacy of . . . . .	60
nominal or colorable . . . . .	60
contingent . . . . .	61
acceptance as . . . . .	61-64
performance of legal obligation . . . . .	64-77
payment of interest as . . . . .	65
part payment of debt as . . . . .	65, 66
effect of uncertainty . . . . .	66-70
assumption of risk as . . . . .	67
compromise and forbearance to sue as . . . . .	67-70
performance of broken contract . . . . .	70-74
agreement to pay additional consideration for per- formance of contract . . . . .	70-74
performance of contract with third person . . . . .	74-77
composition with creditors . . . . .	77
of subscription papers . . . . .	78
must be furnished in reliance upon the promise . . . . .	80-85
relation of deceit to . . . . .	80
mutual promises . . . . .	80
pre-existing obligation . . . . .	81
past . . . . .	81-85
executed . . . . .	81-85

	Page
<b>CONSIDERATION — <i>continued</i>,</b>	
new promise of infant . . . . .	81
in indebitatus assumpsit . . . . .	82
executed upon request . . . . .	83
moral obligation as . . . . .	84
relation of offer and acceptance to . . . . .	85
is determined by promise . . . . .	89-95
in deeds . . . . .	99
in negotiable instruments . . . . .	99
antecedent and subsequent, in negotiable instruments . . . . .	100
illegal . . . . .	124
partial illegality of . . . . .	133-136
requirement of, in memorandum under statute of frauds . . . . .	208-209
failure of, as discharge of contract . . . . .	289-292
<b>CONSTRUCTION OF CONTRACTS . . . . .</b>	
general rules . . . . .	169-174
effect of custom or usage . . . . .	170-171
of several writings as part of the same contract . . . . .	170-171
language construed against the party using it . . . . .	172
general intention controls particular words . . . . .	172
in case of doubt, in favor of promisor . . . . .	172
effect of construction by parties . . . . .	172
contract to be construed as valid if possible . . . . .	173
punctuation to be considered as a last resort . . . . .	174
written words entitled to greater weight than printed . . . . .	174
alternative and optional contracts . . . . .	174
of contracts of guaranty . . . . .	174
of contracts affecting public interests . . . . .	174
of contracts in restraint of trade . . . . .	174
of bailment contracts . . . . .	180-181
penalties and liquidated damages . . . . .	189
essence of the contract . . . . .	184
as to requirement of notice . . . . .	190-191
of two unilateral contracts as one bilateral contract . . . . .	171-172
<b>CONSTRUCTION OF STATUTES . . . . .</b>	
with reference to illegal contracts . . . . .	102
<b>CONTINGENT CONSIDERATION . . . . .</b>	
<b>CONTRACT,</b>	
agreement for future . . . . .	52

	Page
<b>CONTRACTS,</b>	
various uses of the term . . . . .	1
executed and executory . . . . .	1
express and implied . . . . .	2
obligation of . . . . .	4
of record . . . . .	1, 39
judgments . . . . .	1, 39
recognizances . . . . .	1, 39
specialties . . . . .	1
(See also FORMAL CONTRACTS; CONTRACTS UNDER	
SEAL; DEEDS; CHARTERS; COVENANTS.)	
parol contracts . . . . .	1
simple contracts . . . . .	1
enforced by action of debt . . . . .	19
under seal . . . . .	1
(See also FORMAL CONTRACTS; DEEDS; CHARTERS;	
COVENANTS; SPECIALTIES.)	
bilateral and unilateral . . . . .	11
what constitutes a . . . . .	11
formal contract . . . . .	12
enforced by action of debt . . . . .	19
real contracts . . . . .	19
original use of the term . . . . .	20
implied in law. (See QUASI-CONTRACTS.)	
implied in fact . . . . .	24
formation of . . . . .	27
impossible . . . . .	34
distinguished from estoppel . . . . .	91
bilateral and unilateral, offer and acceptance in . . . . .	85
involving personal performance . . . . .	181-182
joint and several . . . . .	137-140
illegal . . . . .	101-136
external limitations of . . . . .	101
written . . . . .	50-52
<b>CONTRACTUAL CAPACITY. (See CAPACITY, CON-</b>	
TRACTUAL.)	
<b>CONTRACTUAL OBLIGATION,</b>	
relation of, to agreement . . . . .	3
unifactoral . . . . .	8
bifactoral . . . . .	9
definition of . . . . .	10

	PAGE
CONTRACTUAL OBLIGATION — <i>continued</i> .	
relation of, to other obligations . . . . .	10
no general theory of, recognized at common law . . . . .	21, 25
nature of . . . . .	301-306
"CORNERS,"	
contracts for, illegal . . . . .	121
CORPORATIONS,	
contractual capacity of . . . . .	34
CORRESPONDENCE,	
contracts by . . . . .	51
CO-TENANT,	
fraud on . . . . .	104
COUNTER-OFFER,	
distinguished from acceptance . . . . .	92
COVENANT,	
allowed as well as debt on formal contracts . . . . .	13
droitural nature of writ . . . . .	18
action of . . . . .	20
definition of . . . . .	21
not to sue distinguished from release . . . . .	282-283
CREDITORS,	
consideration in composition with . . . . .	77
fraud in composition with . . . . .	103-104
CRIME,	
contracts to commit . . . . .	102
CUSTOM,	
effect of, on construction of contract . . . . .	170-171

## D.

DAMAGES . . . . .	301-306
measure of . . . . .	304-305
interest as . . . . .	305
liquidated . . . . .	189
DEATH,	
as a revocation of offer . . . . .	98

	Page
DEATH — <i>continued</i> ,	
as a discharge of personal contracts . . . . .	181
assignment of contract by . . . . .	276
DEBT,	
as a real action . . . . .	13
droitural nature of writ . . . . .	18
two forms of writ . . . . .	18
in the <i>debet</i> and <i>detinet</i> . . . . .	18
in the <i>detinet</i> . . . . .	19
definition of . . . . .	19
writ used to enforce real and formal contracts . . .	19
as a concurrent remedy with <i>indebitatus assumpsit</i> .	24, 25
(See also <i>INDEBITATUS ASSUMPSIT</i> .)	
DECEIT,	
relation of, to contract . . . . .	9
to <i>assumpsit</i> . . . . .	23
action of, for breach of warranty . . . . .	23
relation of, to doctrine of consideration . . . . .	54, 80
DEED. (See also COVENANT; FORMAL CONTRACTS; SPECIALTIES; CONTRACTS UNDER SEAL; WRIT- TEN INSTRUMENTS.)	
execution of . . . . .	17
effect of . . . . .	17
requisites of . . . . .	40
signature of . . . . .	40
necessity of seal . . . . .	40
delivery of . . . . .	41
in escrow . . . . .	41
acceptance of . . . . .	41-43
consideration in . . . . .	99
DELIVERY	
of deeds . . . . .	41
in escrow . . . . .	41
of possession as consideration . . . . .	59
DEPENDENT AND INDEPENDENT PROMISES . 152-160	
dependency a question of intention . . . . .	153
mutual dependency . . . . .	158-159
dependency impossible in unilateral contracts . . .	159
dependency distinguished from discharge of contract by breach . . . . .	286



	Page
DESCRIPTIONS, INCONSISTENT. (See INCONSIS- TENT DESCRIPTIONS.)	
DETRIMENT	
as consideration . . . . .	54
DISCHARGE OF CONTRACT . . . . .	278-298
by performance . . . . .	278-279
by tender . . . . .	279-280
payment as . . . . .	278-279
by internal conditions subsequent . . . . .	280-281
by external conditions subsequent . . . . .	281-295
by waiver . . . . .	281
by breach of warranty . . . . .	281
by gift . . . . .	281
by release . . . . .	282-283
by new contract . . . . .	283-285
within statute of frauds . . . . .	284-285
under seal . . . . .	285
by breach . . . . .	285-286
distinguished from dependency of promises . . . . .	286
by repudiation . . . . .	287-289
by failure of consideration . . . . .	289-292
by alteration or loss of written instrument . . . . .	292-293
by merger and estoppel . . . . .	294-295
discharge of right of action for breach . . . . .	295-298
by accord and satisfaction . . . . .	296-297
by arbitration and award . . . . .	297-298
by laches . . . . .	298
by statute of limitations . . . . .	298
by bankruptcy . . . . .	298
by composition with creditors . . . . .	296-297
by destruction of subject matter . . . . .	178-180
by impossibility in bailment contracts . . . . .	180-181
by impossibility in contracts involving personal per- formance . . . . .	181-182
by death . . . . .	181
of joint and several contracts . . . . .	138-140
distinguished from rescission . . . . .	229
DISCHARGE OF RIGHT OF ACTION FOR BREACH OF CONTRACT . . . . .	295-298
by internal conditions subsequent . . . . .	295
by external conditions subsequent . . . . .	295-298

	Page
DISCHARGE OF RIGHT OF ACTION FOR BREACH OF CONTRACT — <i>continued</i> ,	
by accord and satisfaction . . . . .	296-297
by arbitration and award . . . . .	297-298
by laches . . . . .	298
by statute of limitations . . . . .	298
by bankruptcy . . . . .	298
DIVISIBLE CONTRACTS,	
effect of illegality on . . . . .	132-136
DIVORCE,	
contracts facilitating, illegal . . . . .	115
not to sue for . . . . .	115
DOCUMENTS,	
acceptance of . . . . .	47-50
DRUNKARDS,	
contractual capacity of . . . . .	34
DRUNKENNESS,	
effect of, on contract . . . . .	236-237
DURESS . . . . .	255-258
ground for rescission at law . . . . .	261

E.

EARNEST,	
under statute of frauds . . . . .	211
ELECTION OF PUBLIC OFFICERS,	
contracts to interfere with, illegal . . . . .	106
ELECTION OF REMEDIES . . . . .	268-269
distinguished from estoppel . . . . .	269
ENFORCEMENT OF CONTRACT . . . . .	298-307
sanctions . . . . .	299-300
remedies . . . . .	300-307
EQUITY,	
jurisdiction of, over contracts . . . . .	24
treatment of conditions in . . . . .	167
part performance in, under statute of frauds . . . . .	213-214
ESCROW . . . . .	41
ESSENCE OF THE CONTRACT . . . . .	184-188

	Page
<b>ESTOPPEL,</b>	
relation of, to contract . . . . .	8, 91
under statute of frauds . . . . .	213
distinguished from election of remedies . . . . .	269
as discharge of contract . . . . .	294-295
<b>EVIDENCE,</b>	
contracts to pay for procuring or suppressing of . . .	112
oral, not admissible to vary written contract . . .	50-52
admissible to show that writing is not a	
contract . . . . .	51-52
admissible to show agreement collateral to writ-	
ten contract . . . . .	52
<b>EXECUTED AND EXECUTORY CONSIDERA-</b>	
<b>TION . . . . .</b>	<b>59</b>
(See also <b>PAST CONSIDERATION.</b> )	
<b>EXECUTORS AND ADMINISTRATORS,</b>	
contracts of, within statute of frauds . . . . .	194
<b>EXPRESS CONDITIONS . . . . .</b>	<b>151</b>
<b>EXTERNAL CONDITIONS . . . . .</b>	<b>143, 151, 152</b>
<b>EXTERNAL LIMITATIONS OF CONTRACT . . . . .</b>	<b>101</b>

## F.

<b>FAILURE OF CONSIDERATION,</b>	
as discharge of contract . . . . .	289-292
<b>FIDUCIARY,</b>	
contracts to cause breach of duty by, illegal . . .	105
<b>FORBEARANCE TO SUE,</b>	
as consideration . . . . .	67-70
<b>FORMAL CONTRACTS . . . . .</b>	<b>12, 38</b>
(See also <b>SPECIALTIES; CONTRACTS UNDER SEAL;</b>	
<b>DEEDS; COVENANT.</b> )	
originally regarded as grants . . . . .	13
nature of . . . . .	13
<b>FORMATION OF CONTRACT . . . . .</b>	<b>27</b>
necessity of an act by party bound . . . . .	27
act must be voluntary . . . . .	29
and must determine the extent of the obligation . . .	30

## INDEX.

323

	Page
<b>FRAUD</b> . . . . .	247-255
(See also MISREPRESENTATION.)	
distinguished from innocent misrepresentation . . . . .	254-255
ground for equitable rescission . . . . .	261
contracts to commit . . . . .	102-105
in composition with creditors . . . . .	103-104
in execution of written instruments . . . . .	35-38
fictitious premium on shares . . . . .	104
selling goods with false labels . . . . .	104
on co-tenant . . . . .	104
<b>FUTURE CONTRACT,</b>	
agreement for . . . . .	52

## G.

<b>GAMBLING CONTRACTS</b> . . . . .	105, 115-118
<b>GIFT,</b>	
as discharge of contract . . . . .	281
<b>GOOD CONSIDERATION</b> . . . . .	55
<b>GOOD FAITH,</b>	
confusion of, with reasonableness . . . . .	69, note, 1
<b>"GOODS, WARES, AND MERCHANDISE,"</b>	
what are, within statute of frauds . . . . .	205
<b>GUARANTY,</b>	
construction of contracts of . . . . .	174
communication of acceptance of . . . . .	86-89
conditions in contracts of . . . . .	157
contracts of, within statute of frauds . . . . .	194-200
of infant's contract, within statute of frauds . . . . .	195
of married woman's contract, within statute of frauds . . . . .	195

## H.

<b>HORSE-RACING CONTRACTS</b> . . . . .	117-118
---	---------

## I.

<b>IGNORANCE OF LAW,</b>	
in illegal contracts . . . . .	124

	PAGE
ILLEGAL CONTRACTS . . . . .	101-136
classes of . . . . .	101-124
prohibited . . . . .	101
to do a prohibited act . . . . .	102
contemplating an injury to legal rights of a third party . . . . .	102-105
tending to cause breach of duty by fiduciaries . . . .	105
"Bohemian oats" contracts . . . . .	105
gambling contracts . . . . .	105, 115
against public policy . . . . .	106-124
tending to injure the state in its external relations .	106
trading with alien enemy . . . . .	106
tending to interfere with the internal administration of the government . . . . .	106-114
tending to interfere with the election or appointment of public officers . . . . .	106
tending to prevent public officers from performing their duties . . . . .	107-109
to pay property owners for signing petition . . . . .	108
lobbying contracts . . . . .	107, 108
to pay for establishing station . . . . .	109
tending to obstruct administration of justice . . . .	109-114
maintenance and champerty . . . . .	109-111
tending to stifle prosecution . . . . .	112
to pay for procuring or suppressing evidence . . . .	112
by attorney to defend against criminal prosecutions .	113
by justice of the peace not to charge fees . . . . .	113
to indemnify surety on bail-bond . . . . .	113
to pay justice percentage for stolen property recovered	113
to submit to arbitration . . . . .	113
tending to injure citizens of a state as individuals .	114-124
contracts injurious to public morals . . . . .	114-118
contracts involving sexual immorality . . . . .	114
tending to interfere with marriage relation . . . . .	114
to facilitate divorce . . . . .	115
tending to limit necessary individual freedom . . . .	118-124
contracts to affect the freedom of marriage . . . . .	119
contracts affecting the freedom of testamentary dis- position . . . . .	119
contracts in restraint of trade . . . . .	120-123
"corners" . . . . .	121

	PAGE
ILLEGAL CONTRACTS — <i>continued</i> ,	
to waive exemptions . . . . .	123
contracts imposing unreasonable terms on persons	
dealing with those engaged in public occupations .	123
to waive damages for future tort . . . . .	123
distinguished from void contracts . . . . .	126
securities for . . . . .	128
ILLEGALITY, EFFECT OF . . . . .	124-136
object unlawful . . . . .	124
consideration illegal . . . . .	124
contract legal, intention innocently illegal . . .	124
tendency illegal . . . . .	124
intention of one party illegal . . . . .	125
borrower's intention illegal . . . . .	126
illegal and void contracts . . . . .	126
security for illegal contracts . . . . .	128
<i>in pari delicto potior est conditio defendentis</i> . . .	129
where there is a <i>locus pœnitentiæ</i> . . . . .	129-131
receipts of proceeds of illegal transaction . . .	131
partial illegality . . . . .	132-136
on divisible contracts . . . . .	132-136
of past consideration . . . . .	82
ILLITERACY,	
effect of, on execution of written instruments . .	35-38
IMMORAL CONTRACTS . . . . .	114-118
involving sexual immorality . . . . .	114
tending to interfere with the marriage relation . .	114
IMPLIED CONDITIONS . . . . .	151
IMPLIED CONTRACTS,	
acceptance of benefits . . . . .	43-45
IMPOSSIBILITY,	
inherent . . . . .	34
legal . . . . .	34
physical . . . . .	34
effect of, on contracts . . . . .	174-182
legal . . . . .	176-177
non-existence of subject-matter . . . . .	177-180
no excuse for non-performance of conditions unless	
caused by act of party entitled to insist upon con-	
dition . . . . .	164-166

	Page
IMPOSSIBILITY — <i>continued</i> ,	
of performance, when equivalent to repudiation . . . . .	287-289
IN PARI DELICTO POTIOR EST CONDITIO DE-	
FENDENTIS . . . . .	129
INCONSISTENT DESCRIPTIONS . . . . .	144, 146, 160-162, 186-188
INDEBITATUS ASSUMPSIT,	
origin of . . . . .	23
as a concurrent remedy with debt . . . . .	24-25
advantages of, over debt . . . . .	25
consideration in . . . . .	54
INDEMNITY,	
contract of, not within statute of frauds . . . . .	195, 199
illegal contract of . . . . .	113, 125
INDEPENDENT AND DEPENDENT PROMISES . . . . .	152-160
INFANCY	
ground for rescission at law . . . . .	261
INFANT,	
who is an . . . . .	231
contractual capacity of . . . . .	33, 231
promise of, good consideration . . . . .	59
consideration for new promise of . . . . .	81
contracts of . . . . .	231-233
for necessities . . . . .	232
right of, to rescind not affected by false statement as	
to age . . . . .	233
contracts of, requisites of rescission . . . . .	262-263
INFORMAL AGREEMENTS . . . . .	52
INJUNCTION . . . . .	300, 306-307
INN-KEEPER,	
is under general indefinite recusable obligation . . . . .	7
liability of . . . . .	22
INSANE PERSONS. (See LUNATICS.)	
INSANITY,	
revocation of offer by . . . . .	99
INSOLVENCY,	
assignment of contract by . . . . .	277
INSTALMENT CONTRACTS,	
for conveyance of land . . . . .	154-156
for sale of goods . . . . .	61-64, 157

# INDEX.

327

PAGE

INSTALMENT CONTRACTS — <i>continued</i> ,	
conditions in . . . . .	165-166
INSURANCE,	
contracts of . . . . .	248-249
INSURANCE POLICIES,	
conditions in . . . . .	147-148
INTEREST,	
payment of, as consideration . . . . .	65
as damages . . . . .	305
INTERNAL CONDITIONS. . . . .	143, 151, 152
INTOXICATION,	
effect of, on contracts . . . . .	236-237
IRRECUSABLE OBLIGATIONS. . . . .	6

## J.

JEST,	
contracts made in . . . . .	34
JOINT AND SEVERAL CONTRACTS . . . . .	137-140
in equity . . . . .	139
JUDGMENT . . . . .	39
as discharge of contract . . . . .	295
JUSTICE OF THE PEACE,	
agreement by, not to charge lawful fees . . . . .	113
agreement to pay percentage to, on recovery of stolen property, illegal . . . . .	113

## K.

KNOWLEDGE,	
of offer essential to contract . . . . .	80

## L.

LACHES,	
as a bar to rescission of contract . . . . .	269-270
as discharge of contract . . . . .	298
LÆSIO FIDEI . . . . .	21



	PAGE
LAND,	
assignment of contract by transfer of . . . . .	277
contracts concerning, within statute of frauds . . . .	200
LEASE,	
as bilateral contract . . . . .	148
conditions in . . . . .	148
LIBEL,	
contracts to publish . . . . .	102
LIMITATIONS, STATUTE OF. (See STATUTE OF	
LIMITATIONS.)	
LIQUIDATED DAMAGES . . . . .	189
LOAN,	
effect of borrower's illegal intention . . . . .	126
LOBBYING CONTRACTS . . . . .	107-108
LOCUS PENITENTIÆ,	
effect of, on illegal contract . . . . .	129-131
LOSS OF WRITTEN INSTRUMENT,	
as discharge of contract . . . . .	292-293
LUNATIC,	
contract of, voidable . . . . .	233-237
void after judicial declaration of insanity . . . .	237
liability for necessities . . . . .	235-236
contractual capacity of . . . . .	34

## M.

MAINTENANCE AND CHAMPERTY . . . . .	109-111
MALICIOUS INTERFERENCE WITH CONTRACT	215
MARRIAGE,	
assignment of contract by . . . . .	277
contracts in consideration of, within statute of frauds	200
not part performance under statute of frauds . . . .	213
MARRIAGE BROKAGE CONTRACTS . . . . .	119
MARRIAGE RELATION,	
contracts tending to interfere with . . . . .	114
MARRIED WOMAN,	
contractual capacity of . . . . .	33
promise of, no consideration . . . . .	59

	Page
<b>MEMORANDUM,</b>	
required under statute of frauds . . . . .	206-210
what is sufficient . . . . .	206-209
what it must show . . . . .	207-209
how it must be signed . . . . .	209-210
when it must be made . . . . .	210
<b>MENTAL INCAPACITY,</b>	
as ground for rescission of contract . . . . .	233-237
Massachusetts doctrine . . . . .	233-234
English doctrine . . . . .	235
ground for rescission at law . . . . .	261
requisites of rescission for . . . . .	263
<b>MERGER,</b>	
as discharge of contract . . . . .	294-295
<b>MISREPRESENTATION,</b>	
and fraud . . . . .	247-255
by partial disclosure . . . . .	249
as to opinions . . . . .	250
as to intention . . . . .	250
as to law . . . . .	251
seller's statements . . . . .	252
<i>simplex commendatio</i> . . . . .	252
must be acted on to render contract voidable . . . . .	252-254
must be acted on within a reasonable time . . . . .	253
innocent and fraudulent . . . . .	254-255
ground for equitable rescission . . . . .	261
<b>MISTAKE. (See also INCONSISTENT DESCRIPTIONS.)</b>	
as to subject-matter of contract . . . . .	160-162, 243-244
common to both parties . . . . .	237-245
as to terms of contract . . . . .	90, 91, 238-243
as ground for reformation of contract . . . . .	238-243
of law . . . . .	240-243
as to inconsistent description . . . . .	243-244
as to existence of subject-matter . . . . .	187, 244
as to identity of subject-matter . . . . .	90, 244
as to identity of promisee . . . . .	245
of one party . . . . .	245-255
not known to the other . . . . .	245-246
known to the other . . . . .	246-255
of one party as to nature of promise . . . . .	246-247

	PAGE
<b>MISTAKE — <i>continued</i>,</b>	
as to existence of subject-matter . . . . .	144
as to location of ship in charter-party . . . . .	145
in execution of written instruments . . . . .	35-38
as to title to property . . . . .	187
as to quality of subject-matter . . . . .	187-188
ground for equitable rescission . . . . .	261
<b>MISUNDERSTANDING.</b> (See <b>MISTAKE</b> , <b>MISREPRESENTATION</b> .)	
<b>MORAL OBLIGATION</b>	
as consideration . . . . .	84
(See also <b>PAST CONSIDERATION</b> .)	
<b>MORTGAGE,</b>	
assumption of . . . . .	219, 224, 228
<b>MOTIVE,</b>	
inducing acceptance of offer, material . . . . .	80
<b>MUTUAL DEPENDENCY</b> . . . . .	158-159
<b>MUTUAL PROMISES,</b>	
as consideration for each other . . . . .	11, 58, 80
in subscription papers . . . . .	79

## N.

<b>NEGLIGENCE,</b>	
liability for . . . . .	22
of party defrauded . . . . .	253-254
<b>NEGOTIABILITY</b> . . . . .	275-276
<b>NEGOTIABLE INSTRUMENTS</b> . . . . .	275-276
cannot be conditional . . . . .	159
consideration in . . . . .	99
as unifactoral and bifactoral obligations . . . . .	100
cannot form part of any other contract . . . . .	12
<b>NEGOTIATIONS,</b>	
merged in contract . . . . .	51
<b>NOTICE,</b>	
of revocation of offer . . . . .	96-98
in case of optional contracts . . . . .	174
contracts conditional on . . . . .	190-191

# INDEX.

331

	PAGE
NOVATION,	
contract of, not within statute of frauds . . . . .	196
New Hampshire doctrine . . . . .	223
NUDUM PACTUM . . . . .	55
(See also CONSIDERATION.)	

## O.

OBLIGATION,	
performance of, as consideration . . . . .	64-77
OBLIGATION OF CONTRACT . . . . .	4, 70-74, 301-304
OBLIGATIONS,	
classification of . . . . .	5
recusable and irrecusable . . . . .	6
unifactoral and bifactoral . . . . .	7
OFFER,	
must be accepted within prescribed time . . . . .	93
or within reasonable time . . . . .	93
must be accepted in prescribed manner or in a reason- able manner . . . . .	93
in formal contracts . . . . .	43
(See also PROMISE.)	
and acceptance, relation of, to consideration . . . . .	85
must correspond . . . . .	89-95
revocation of, by operation of law . . . . .	98-99
by death . . . . .	98
by notice . . . . .	96
by offeree's knowledge of impossibility of per- formance . . . . .	96-98
by insanity . . . . .	99
of reward . . . . .	80
knowledge of, essential to contract . . . . .	80
of reward, revocation of . . . . .	98
OFFICERS, PUBLIC. (See PUBLIC OFFICERS.)	
OPERATION OF CONTRACT . . . . .	215-228
as to obligations . . . . .	215
as to rights . . . . .	216-228
at common law and in equity . . . . .	216
contract can be enforced only by party . . . . .	216
exceptions to the foregoing rule . . . . .	216-217

	Page
<b>OPERATION OF CONTRACT — <i>continued</i>,</b>	
right of stranger to contract to sue . . . . .	217-228
cases in which such right is recognized . . . . .	217-223
nature of such right . . . . .	223-226
doctrine of Federal courts . . . . .	226-228
<b>OPTIONAL CONTRACTS . . . . .</b>	<b>61-64</b>
construction of . . . . .	174
conditions in . . . . .	157
 <b>P.</b> 	
<b>PART PAYMENT,</b>	
of debt as consideration . . . . .	65-66
under statute of frauds . . . . .	211
<b>PART PERFORMANCE,</b>	
effect of, on contracts within statute of frauds . . . . .	212-214
<b>PARTIAL ILLEGALITY . . . . .</b>	<b>132-136</b>
<b>PARTNERSHIP CONTRACTS,</b>	
not joint and several . . . . .	140
<b>PAST CONSIDERATION . . . . .</b>	<b>81-85</b>
illegality of . . . . .	82
in indebitatus assumpsit . . . . .	82
relation of, to agency . . . . .	83
<b>PAYMENT,</b>	
as discharge of contract . . . . .	278-279
<b>PENALTIES,</b>	
and liquidated damages . . . . .	189
effect of imposition of, on contracts . . . . .	102
<b>PERFORMANCE,</b>	
of broken contract as consideration . . . . .	70-74
of contract with third person as consideration . . . . .	74-77
of conditions . . . . .	162
reasonableness in . . . . .	166-167
as discharge of contract . . . . .	278-279
substituted . . . . .	284-285
<b>POSSESSION,</b>	
delivery of, as consideration . . . . .	59
<b>PRE-EXISTING OBLIGATION</b>	
as consideration . . . . .	81

PREFERENCE,	
in fraudulent composition with creditors . . . .	103-104
PRIVITY OF CONTRACT. (See OPERATION OF CON- TRACT.)	
PROCEDURE,	
history of (See ACTIONS; TRIAL.)	
PROHIBITED CONTRACTS . . . . .	101
PROMISE,	
what constitutes a . . . . .	43-52
acceptance of benefits . . . . .	43-45
not under seal cannot form part of sealed contract . .	11
(See CONTRACTS.)	-
mutual promises . . . . .	11, 58, 79, 80
relation of, to contract . . . . .	12
used as equivalent of assurance . . . . .	13
determines consideration . . . . .	89-95
revocation of . . . . .	95-99
PROMISES,	
dependent and independent . . . . .	152-160
PROMISSORY NOTE. (See NEGOTIABLE INSTRU- MENTS.)	
PROPERTY OWNERS,	
agreements to pay, for consenting to improvements .	108
PROPOSALS . . . . .	45, 46
PROSECUTION,	
contracts to stifle, illegal . . . . .	112
PUBLIC OFFICERS,	
contracts tending to interfere with election or ap- pointment of, illegal . . . . .	106
contracts tending to prevent performance of duties of . . . . .	107-109
PUBLIC POLICY,	
contracts against . . . . .	106-124
tending to injure state in its external relations	106
trading with alien enemy . . . . .	106
tending to interfere with internal administra- tion of the government . . . . .	106-114

	PAGE
<b>PUBLIC POLICY — <i>continued</i>,</b>	
tending to interfere with election or appointment of officers . . . . .	106
tending to prevent public officers from performing their duties . . . . .	107-109
to pay property owners for signing petition . . . . .	108
lobbying contracts . . . . .	107-108
to pay for establishing station . . . . .	109
tending to obstruct administration of justice . . . . .	109-114
maintenance and champerty . . . . .	109-111
tending to stifle prosecution . . . . .	112
to pay for procuring or suppressing evidence . . . . .	112
by attorney to defend against criminal prosecution . . . . .	113
by justice of the peace not to charge fees . . . . .	113
to indemnify surety on bail-bond . . . . .	113
to pay justice percentage for stolen property recovered . . . . .	113
to submit to arbitration . . . . .	113
tending to injure citizens of the state as individuals . . . . .	114-124
contracts injurious to public morals . . . . .	114-118
tending to interfere with marriage relation . . . . .	114
to facilitate divorce . . . . .	115
tending to limit necessary individual freedom . . . . .	118-124
contracts affecting freedom of marriage . . . . .	119
contracts affecting freedom of testamentary disposition . . . . .	119
contracts in restraint of trade . . . . .	120-123
"corners," contracts for, illegal . . . . .	121
contracts to waive exemptions . . . . .	123
contracts imposing unreasonable terms on persons dealing with those engaged in public occupations . . . . .	123
contracts to waive damages for future tort . . . . .	123
<b>PUNCTUATION,</b>	
to be considered as a last resort in construction of contracts . . . . .	174

## Q.

	Page
<i>QUANTUM MERUIT.</i> (See also <i>ASSUMPSIT</i> ; <i>INDEBITATUS ASSUMPSIT.</i> )	
origin of . . . . .	24
<i>QUANTUM VALEBANT.</i> (See also <i>ASSUMPSIT</i> ; <i>INDEBITATUS ASSUMPSIT.</i> )	
origin of . . . . .	24
<i>QUASI-CONTRACTS,</i>	
enforced by <i>indebitatus assumpsit</i> . . . . .	24
infant's liability for necessities . . . . .	232
<i>QUID PRO QUO</i> . . . . .	20
(See also <i>CONSIDERATION.</i> )	
as consideration in debt . . . . .	54

## R.

<i>RAILWAYS,</i>	
effect of time-tables . . . . .	47
modification of liability by contract . . . . .	47-50
contracts to pay for establishing station, illegal . . . . .	109
<i>RATIFICATION,</i>	
of infant's contracts . . . . .	265-268
of insane person's contracts . . . . .	268
of voidable contracts in general . . . . .	268-269
of an unauthorized act with reference to consideration . . . . .	83
<i>REASONABLE TIME,</i>	
offer must be accepted within . . . . .	93
<i>REASONABLENESS,</i>	
in performance of condition . . . . .	166-167
promisee's conduct must be reasonable . . . . .	34
in construction of contract . . . . .	182-184
reasonable time . . . . .	182-183
reasonable satisfaction . . . . .	183-184
confusion of, with good faith . . . . .	69, note 1
<i>RECEIPT,</i>	
as evidence of contract . . . . .	47-50
under statute of frauds . . . . .	210-211
<i>RECOGNIZANCES.</i> . . . .	39



	Page
RECORD, CONTRACTS OF. (See CONTRACTS OF RECORD.)	
RECUSABLE OBLIGATIONS,	
definition of . . . . .	6
definite and indefinite . . . . .	6
REFORMATION OF CONTRACT . . . . .	238-243
distinction between, and rescission . . . . .	239-240
RELEASE,	
as discharge of contract . . . . .	282-283
distinguished from covenant not to sue . . . . .	282-283
by promisee, effect of, on beneficiary's right to sue . . . . .	225-226
REMEDIES . . . . .	300-307
injunction . . . . .	300, 306-307
damages . . . . .	301-306
specific performance . . . . .	306-307
RENUNCIATION,	
of contract. (See REPUDIATION.)	
REPRESENTATIONS,	
distinguished from conditions and warranties . . . . .	149
REPUDIATION OF CONTRACT,	
as waiver of conditions . . . . .	165, 166
as discharge of contract . . . . .	287-289
as anticipatory breach . . . . .	303-304
RESCISSION OF CONTRACT . . . . .	229-270
definition of . . . . .	229
distinguished from discharge . . . . .	229
causes for . . . . .	230-259
distinction between, and reformation . . . . .	239-240
modes of . . . . .	260-262
<i>in pais</i> . . . . .	260-262
by plea . . . . .	260-262
judicial rescission . . . . .	260-262
by reply . . . . .	260
requisites of . . . . .	262-265
may be barred by ratification . . . . .	265-269
or by laches . . . . .	269-270
or by statute of limitations . . . . .	270
RESTITUTIO IN INTEGRUM . . . . .	264-265

	Page
<b>RESTRAINT OF TRADE,</b>	
contracts in . . . . .	120
require consideration . . . . .	120
must be reasonable in extent . . . . .	120-123
construction of contracts in . . . . .	174
<b>REVENUE LAWS,</b>	
contracts in violation of . . . . .	102
<b>REVOCATION OF OFFER . . . . .</b>	<b>95-99</b>
of reward . . . . .	98
of time-tables . . . . .	98
by notice . . . . .	96
by operation of law . . . . .	98, 99
by death . . . . .	98
by offeree's knowledge of impossibility of perform- ance . . . . .	96-98
by insanity . . . . .	99
<b>REWARD, OFFER OF . . . . .</b>	<b>80</b>
not a wager . . . . .	117
revocation of . . . . .	98
<b>RISK,</b>	
assumption of, as consideration . . . . .	67

## S.

<b>SALE,</b>	
distinction between executory and executed con- tract of . . . . .	146-147
conditions in contract of . . . . .	146-147
effect of warranty in case of inconsistent descrip- tions . . . . .	144, 146, 161
effect of vendee's illegal intention . . . . .	125-126
of goods, contract of, within statute of frauds . . . . .	204-206
what is contract for sale of goods . . . . .	204-205
<b>SANCTIONS . . . . .</b>	<b>299-300</b>
<b>SATISFACTION,</b>	
contracts conditional on . . . . .	183-184
<b>SEAL. (See also DEED; COVENANT; FORMAL CON-         TRACT; SPECIALTIES.)</b>	
necessity of, in deeds . . . . .	17, 21, 40

	PAGE
SEAL — <i>continued</i> ,	
effect of . . . . .	17
definition of . . . . .	40-41, 307
as presumptive evidence of consideration . . . . .	283
SEPARATION,	
of husband and wife, contract for . . . . .	115
SEXUAL IMMORALITY,	
contracts involving . . . . .	114
SIGNATURE,	
to memorandum, required by statute of frauds . . . . .	209-210
of deeds . . . . .	40
SILENCE,	
not a representation . . . . .	248-249
unless there is a duty to speak . . . . .	248-249
cannot give rise to contractual obligation . . . . .	27
unless coupled with previous conduct . . . . .	28
SIMPLE CONTRACTS,	
necessarily bifactoral . . . . .	43
<i>SIMPLEX COMMENDATIO</i> . . . . .	252
SOCIAL ENGAGEMENTS,	
not contracts . . . . .	34
SPECIALTIES . . . . .	39
requisites of . . . . .	40
SPECIFIC PERFORMANCE . . . . .	306-307
SPENDTHRIFTS,	
contractual capacity of . . . . .	34
STATUTE OF FRAUDS . . . . .	192-214
executors' and administrators' contracts . . . . .	194
guaranties . . . . .	194-200
contracts of indemnity, not within . . . . .	195-199
novation, not within . . . . .	196
guaranty of contract of married woman, within . . . . .	196
guaranty of contract of infant, within . . . . .	196
"new consideration" rule . . . . .	196-200
marriage contracts . . . . .	200
"lands, tenements, and hereditaments" . . . . .	200-201
contracts not to perform within one year . . . . .	201-204
contracts for sale of goods . . . . .	204-206
what is contract for sale of goods . . . . .	204-205
what are "goods, wares, and merchandise" . . . . .	205

STATUTE OF FRAUDS — <i>continued</i> ,	
requirements of,	
memorandum . . . . .	206-210
acceptance and receipt . . . . .	210-211
earnest and part payment . . . . .	211
effect of . . . . .	211-214
effect of part performance on . . . . .	212-214
discharge of contract within . . . . .	284-285
oral promise good consideration . . . . .	59
STATUTE OF LIMITATIONS,	
consideration for new promise to pay debt barred by . . . . .	81
as a bar to rescission of contract . . . . .	270
as discharge of contract . . . . .	298
STATUTE OF WESTMINSTER II. . . . .	21
STATUTES,	
construction of, with reference to illegal contracts . . . . .	102
merchant and staple . . . . .	39
STIFLING COMPETITION,	
in auctions . . . . .	104
STIFLING PROSECUTION,	
contracts, illegal . . . . .	112
SUBROGATION,	
distinction between, and right of stranger to sue on	
contract . . . . .	224-228
SUBSEQUENT CONSIDERATION,	
in negotiable instruments . . . . .	100
SUBSCRIPTION PAPERS,	
consideration in . . . . .	78
SUBSCRIPTION TO STOCK . . . . .	
	80
SUBSTITUTED CONTRACT,	
as discharge of contract . . . . .	283-285
distinguished from substituted performance . . . . .	284-285
SUBSTITUTED PERFORMANCE,	
distinguished from substituted contract . . . . .	284-285
SURETY,	
liability of, on parol contract . . . . .	19
agreement to indemnify, on bail-bond, illegal . . . . .	113
SURETYSHIP,	
contracts of . . . . .	249

	Page
<b>SURVIVORSHIP,</b>	
in joint and several contracts . . . . .	138-140
<b>SUSPENSION OF CONTRACT,</b>	
by internal condition . . . . .	149
 <b>T.</b>	
<b>TENDER,</b>	
as discharge of contract . . . . .	279-280
<b>TESTAMENTARY DISPOSITION,</b>	
contracts affecting freedom of . . . . .	119
<b>TICKETS,</b>	
as evidence of contract . . . . .	47-50
<b>TIME,</b>	
reasonable . . . . .	182-183
as essence of contract . . . . .	185-186
<b>TIME-TABLES . . . . .</b>	<b>47</b>
revocation of . . . . .	98
<b>TORT,</b>	
contracts to commit . . . . .	102-105
contract to waive damages for future, illegal . . . .	123
<b>TRADE, RESTRAINT OF. (See RESTRAINT OF</b>	
<b>TRADE.)</b>	
<b>TRADES-UNIONS,</b>	
contracts of . . . . .	122
<b>TRADING WITH ALIEN ENEMY . . . . .</b>	<b>106</b>
<b>TRESPASS,</b>	
writ of . . . . .	22
<b>TRESPASS ON THE CASE. (See also ASSUMPSIT.)</b>	
writs of . . . . .	22
<b>TRIAL,</b>	
old forms of . . . . .	15
by record . . . . .	16
by charters or documents . . . . .	16, 17
by witnesses . . . . .	16
by oath . . . . .	16
by ordeal . . . . .	16
by battle . . . . .	16
<b>TRUST,</b>	
gives rise to indefinite recusable obligation . . . .	7

# INDEX.

341

PAGE

TRUST — <i>continued</i> ,	
extension of theory of, by common law courts . . .	223
TRUSTEE,	
contracts to cause breach of duty by, illegal . . .	105
TRUSTS. (See RESTRAINT OF TRADE.)	

## U.

UBERRIMAE FIDEI,	
contracts . . . . .	248-249
UNCERTAINTY,	
effect of, with reference to consideration . . .	66-70
UNDERTAKING,	
distinction between, and contract . . . . .	7
necessity of, in assumpsit . . . . .	22, 23
UNDUE INFLUENCE . . . . .	259
ground for equitable rescission . . . . .	261
UNFAIR DEALING . . . . .	259
UNIFACTORAL OBLIGATIONS,	
negotiable instruments as . . . . .	100
UNILATERAL CONTRACTS . . . . .	11
acceptance in . . . . .	85
of sale . . . . .	146-147
of insurance . . . . .	147-148
construction of two, as a bilateral contract . . .	171-172
USURY,	
effect of new promise to pay debt originally void for .	82

## V.

VALUABLE CONSIDERATION. (See CONSIDERA-	
TION.)	
VENDEE'S INTENTION ILLEGAL . . . . .	125
VENDOR AND PURCHASER,	
instalment contracts . . . . .	154-156
VOID CONTRACTS,	
distinguished from illegal contracts . . . . .	126
VOIDABLE CONTRACTS. (See RESCISSION OF CON-	
TRACT.)	

	Page
<b>VOLUNTARY ACT,</b>	
definition of . . . . .	29, 30

## W.

<b>WAGER OF LAW . . . . .</b>	<b>16, 25</b>
<b>WAGERING CONTRACTS . . . . .</b>	<b>105</b>
void in England, illegal in America . . . . .	127
of insurance . . . . .	116
for options on futures . . . . .	116-117
effect of, between principal and agent . . . . .	116-117
<b>WAIVER,</b>	
as discharge of contract . . . . .	281
of conditions . . . . .	163-167
<b>WARRANTY . . . . .</b>	<b>13</b>
action of deceit for breach of . . . . .	23
breach of, as discharge of contract . . . . .	281
distinguished from conditions and representations . . . . .	149
(See also CONDITIONS.)	
effect of, in cases of inconsistent description . . . . .	144, 146, 161
<b>WILL,</b>	
contract to make . . . . .	120
<b>WRITS,</b>	
in contractual actions . . . . .	18
<b>WRITTEN CONTRACTS,</b>	
cannot be varied by oral evidence . . . . .	50-52
execution of . . . . .	35
mistake and fraud in the execution of . . . . .	35-38

## Y.

<b>YEAR,</b>	
contracts not to be performed within, under statute	
of frauds . . . . .	201-204









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